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THE RELATION BETWEEN COMMERCIAL LAW AND COMMERCIAL PRACTICE*

THE ordinary citizen has to take the law much as he finds it. If someone does him what he conceives to be an injury, he hopes that there will be some process whereby he can obtain redress; but if his solicitor, while sympathising with the harsh treatment which he has received, tells him that it is not a matter in which the law gives a remedy, he accepts the position, frequently with patience and usually without surprise. He does not expect the law to conform too closely to his own ideas. 'It may be equity but it is not justice' was a favourite phrase of one of my aunts who paid too many visits to Lincoln's Inn.

This resignation has never been the attitude of the business man, as he is now called,—the merchant, as he was called in the years when the law merchant was growing up. He is able to adopt a more independent line because plaintiff and defendant are generally prepared to co-operate. In the ordinary sphere of litigation a defendant is usually delighted to take advantage of every technicality that will enable him to frustrate the plaintiff. But business men are not always separated by a quarrel or a grievance; usually they have a friendly dispute which they want solved. If the courts will not solve it for them satisfactorily they will find somebody else who will. If the ordinary plaintiff is denied an effective remedy the ordinary defendant is pleased to take advantage of it. Not so the merchants who are constantly dealing with each other. The fair solution of a dispute is a matter of concern to all.

Looked at in a broader sense, an economic system which did not include as a part of itself, or at any rate as an adjunct to it, machinery for settling commercial differences in accordance with the ideas of commercial men would be bad for trade. Such machinery is one of the facilities which a great trading country must afford if its trade is to prosper. It was upon this postulate that the law merchant was founded. May I take a quotation from the year books of 1475, set out in Professor Potter's *Historical Introduction to English Law*, 2nd ed., p. 160: 'This suit is brought by an alien merchant who has come to conduct his case here; and he ought not to be held to sue according to

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the law of the land, to await trial by twelve men and other solemnities of the law of the land, but ought to sue here, and it ought to be determined according to the law of nature in the Chancery, and he ought to be able to sue there from hour to hour and day to day for the speed of merchants'. Not all of this is still true. The twelve men are now diluted with women and are regarded as a luxury rather than an imposition. The reference to the law of nature as administered in Chancery is no longer apposite: no merchant would put up with the sort of treatment which the courts of Chancery are popularly supposed to mete out to testators who cannot answer back. But in its spirit, particularly in its feeling for the alien merchant, it is as true today as it was 500 years ago. The Commercial Court prides itself upon being as much a part of the City of London as it is of the machinery of the law; and the part that London has played, in international shipping and insurance particularly, has benefited from the willingness of foreigners to litigate in the Commercial Court. All this means that in commercial matters lawyers are willing to be unusually responsive to the needs of their public. The counsel who sends away a client with a good grievance but no legal remedy may shake his head sadly over the gaps in the law; but he rarely feels that his pocket is likely to be touched. The knowledge that if a customer does not like your wares he may go elsewhere,—to arbitration or to the courts of another country,—is salutary. Unlike the somewhat aloof dignity of the ordinary court of justice, with the feeling that the recipient ought to be glad to get whatever he is given, the commercial law and commercial courts take a particular pride in attracting business and in dealing with it in a manner which is felt to be satisfactory. The maxim *boni judicis est ampliare jurisdictionem* is as an advertising slogan perhaps lacking in mass appeal, but it does at least indicate the general idea that a court should sometimes go out and get business.

The law merchant and the special courts of boroughs and fairs and the Court of Piepowder were designed to give speedy and simple justice according to the custom of merchants. By the seventeenth century it was established that the custom of merchants was part of the common law. Such custom is after all no more than a rule which merchants informally make for their own conduct and in theory therefore commercial law ought to be a reflection of the constantly changing ideas of conduct which merchants may have. But in truth it is only with much effort that law and practice upon any subject can be kept together; and that is because, though they have the same origin, they are in their motions attracted by different objects. Rigidity and a regular pattern are pleasing to the legal mind, and so soon as he can the lawyer sets up a system of principles and rules from which he is reluctant to depart. He may start close to his subject, but because it is alive, illogical and contrary, it is likely to slip and slither out of the pattern he devises

for it. The danger in any branch of the law is that it ossifies. If all lawyers were made doctors overnight, they would flock to the dissecting rooms, for I am sure that they would prefer corpses to live patients. The lawyer starts, for example, by telling himself that he construes contracts so as to ascertain the intentions of the parties; but before long he has invented canons of construction and other rules which make things easier for himself but much more difficult for the parties who do not know the rules. The Sale of Goods Act is, I suppose, the custom of merchants as developed by lawyers, but developed to such an extent that most of it is now as strange to the average business man as the laws of contract bridge would be to the player who first thought of whist.

In this lecture I want to examine what it is that keeps commercial law in tune with the ideas of business men. It is no longer custom. It is perhaps too strong a thing to say that proof of a new custom of any importance is hardly more than a theoretical possibility, but certainly it is very rare. What has virtually killed it is the written contract. In the days when a market was a definite place and when trading was done by the interchange of a few words, the custom of the market was the basis of the contract. Moreover, it was reasonable to assert that a person who traded in a particular place must be taken to have informed himself about the customs of that place. But when the scope for trading activities was enlarged and buyer and seller no longer met face to face, the written word superseded the spoken; and the identification of a custom common to both parties became more difficult. Today a trade custom will not be received by the court unless it can be shown to be reasonable, to be consistent with the express terms of the contract and to be universally recognised in the trade as a binding custom. It is this last stipulation that usually proves to be the stumbling block. The witness who seeks to prove the custom will be asked to cite instances in which a party has submitted willy-nilly to what is said to be the customary mode of performance or the customary claim, thereby recognising the binding force of the custom. If he cites what he thinks is an instance, he will be asked for the terms of the relevant contract, which he rarely knows; for unless it can be shown that a party has submitted to something beyond the express or implied requirements of his contract, he cannot be said to have paid tribute to the custom. Universality is a stiff test too; one witness of repute who says he has never recognised the custom may be fatal. It is for this reason that while trade customs are often asserted by business men they frequently turn out to be no more than the way in which that particular man has become habituated to doing business—any practitioner in the courts will advise his client that the satisfactory proof of custom is notoriously difficult. Thus, though custom was the fount of the law merchant, it can no longer be regarded as a revivifying source of commercial law.

But, as in most systems which are vital and flexible, that which destroys the old brings with it its own solution. The written contract which so largely destroyed custom has placed in the hands of business men a substitute for it. Few business men can be bothered to write elaborate contracts for themselves. The ordinary small tradesman sometimes has a set of conditions on the back of his notepaper. He rarely takes the necessary precautions to make sure they are any part of any contract; and certainly never seems to envisage the possibility of their clashing with a similar set of conditions on the opposite side. A fortnight ago a witness before me, who found himself in that position, was asked why he had not written to the other side so as to reach some agreement upon what conditions should prevail. 'We should never get any business done if we did *that* sort of thing', he said, 'besides we haven't got time for it.' 'Then why do you have any conditions at all?' 'Oh, everybody does.' Usually such conditions have grown up piecemeal. On an occasion when he sustains some reverse at the hands of the law, the business man will decide that he must have something to prevent that happening again and will frame a condition accordingly.

But in the more organised trades it is different. Forms of contracts are prepared by central bodies and are invariably used. A Lloyd's policy, for example, is a short and usually quite irrelevant document; but there will be attached to it an appropriate set of clauses such as, in the case of marine insurance, the Institute Time Clauses, the Institute Cargo Clauses, or the Institute Freight Clauses. Charterparties are similarly settled on recognised forms. The Baltime charterparty is an example. It is a form settled in 1912 and since revised from time to time. The London Corn Trade Association has its forms of contract for c.i.f. trading and f.o.b. trading and so on. It is these three topics—insurance, more particularly marine insurance; shipping, that is, particularly contracts of affreightment such as charterparties and bills of lading; and the sale of goods, c.i.f. or f.o.b. or otherwise involving shipment, which are the chief material involved in the commercial list. In addition to these contractual forms there are other matters incorporated into contracts. Thus The Hague Convention is incorporated into most contracts of affreightment either by virtue of statute, in this country the Carriage of Goods by Sea Act, 1924, or by an over-riding clause generally known as the Clause Paramount. Similarly general average is governed by the set of rules known as the York-Antwerp Rules which are revised from time to time, the last time being in 1950.

Now the important thing is that all these documents are mainly the work of commercial men. In the drafting of some, such as The Hague Convention, the lawyers take a hand. But the Institute clauses and the ordinary contractual forms are the work of laymen. From time to time the courts are apt to say that they are very

badly expressed and it is a pity that whoever is responsible for them did not go to a good firm of commercial solicitors. But the laymen pursue their way undeterred. It may seem curious that when the authors of these forms and clauses realise, as they must, that in the event of a dispute the result will turn upon what view the lawyer takes of them, they should not get a lawyer to draft them. But they regard it as more important that they should keep the drafting in their own hands; and I think that, whatever the formal imperfections may be, that is a practice which contributes to the health and vitality of commercial law. Although it may not render the corpus of commercial law more beautiful or more artistic, it does make it healthier and more vigorous.

What this amounts to is that the ideas of the lawyers are ultimately controlled by the laymen. That is of course true in the case of the ordinary law of the land, where Parliament is the revising agency. But excepting matters where the Crown's own purse is touched—revising legislation will come quickly enough to overturn a revenue decision unfavourable to the Crown—the process is a slow one. The commercial world acts in the same way but more quickly to bring the law into accord with its ideas. Numerous examples could be cited. *British and Foreign Marine Insurance* v. *Sanday* [1916] 1 A.C. 650 concerned two British ships carrying British goods to Hamburg, and which on the outbreak of war in August 1914 were diverted to British ports. The goods themselves therefore were saved from the enemy; but it was held by the House of Lords that there was a constructive total loss under the policy insuring them, inasmuch as they had not reached their destination and therefore the venture was lost. The decision was one which followed from the legal conception of constructive total loss, once it was properly understood; but clearly it carried the underwriters further than they wanted to go. So they amended their policies for the future by adding a clause:— 'warranted free of any claim based upon loss of, or frustration of, the insured voyage or adventure caused by arrests restraints etc'. This clause in turn was the subject of litigation during the 1939 war in *Rickards* v. *Forestal Land Co.* [1942] A.C. 50.

In making amendments of this sort the laymen leave a lot to the lawyers. Ad hoc amendments are likely in any event to do that: witness the series of Rent Restriction Acts. But an amending statute contains at least an attempt to cover in an orderly manner such contingencies as can be foreseen. The layman does not always seek to do that. His method of drafting is to add, but rarely to alter or remove. The clause which I have just cited is typical. The draftsman does not get at his object by amending what is in the policy already; he just adds a clause to it saying that it is to be 'warranted free' of whatever it is that he does not like. If he wants to add a special term to a printed charterparty he writes it in the margin, or perhaps stamps it over the print

with a rubber stamp, not much caring whether the print under the stamp remains legible; or he attaches a printed slip. The usual insurance policy, for example, carries its endorsements like bunting flapping in all directions. The business man does not trouble to consider what effect the particular addition may have on the contract as a whole. He relies on the courts to work that out for him. As a result the courts have evolved a number of rules which are more or less specially designed to deal with commercial documents, to which they will grant a latitude which would never be extended to the efforts of the professional lawyer. They are quite used to dealing with flat contradictions; it is not uncommon to find some part of the document saying one thing and another another. So they have rules to deal with this—not lawyers' rules but rules which do, I think, reflect an accurate knowledge of the way in which these documents are built up. There is the rule, for example, that where written and printed words are inconsistent the written words shall govern; see, for example, *Hollis* v. *White Sea Timber Trust* (1936) 56 Ll.L.R. 78 *per* Porter J. (as he then was) at 81. The court assumes, I think rightly, that the business man certainly intends what he specially wrote on to operate, but may well have forgotten some part of the mass of print. There is the even more sweeping rule known as the rule in *Glynn* v. *Margetson* [1893] A.C. 357 whereunder the court can as a matter of construction disregard a clause which is repugnant to the main object of the contract. There again the courts assume that the parties will know what it is they have in mind, but will often not take the trouble to make sure that all the various clauses fit in with the central idea. In the administration of this rule in *Temple S.S. Co., Ltd.* v. *Soyfracht*, the Court of Appeal was prepared to disregard even a clause which the parties had written into the print, though the House of Lords found it possible to uphold the same construction without quite such drastic action; see (1945) 79 Ll.L.R. 1 *per* Simon L.C. at 7. Then it is a long time since anyone has sought to invoke the presumption against surplusage in the construction of a commercial document. Business men are confirmed tautologists. Where the lawyer says:— 'You need not say that because it is already covered', the business man says:— 'If it is already covered, what is the harm in saying it again?'

On the whole this partnership has worked very satisfactorily. Both sides have gone some distance to understanding and appreciating the views of the other. The lawyers smile amiably at the little tit-bits which are dear to the hearts of business draftsmen. No charterparty, for example, is complete without the clause: 'Penalty for non-performance of this charterparty is proved damages'. A similar clause, which provided that the penalty should be the estimated amount of freight, was first held inoperative by the courts in 1811; and has appeared quite regularly ever since. In contracts for the sale of goods there is a clause that has

become very popular, and that is: 'Each delivery to stand as a separate contract'. So far as I know that has not yet been judicially construed, and when it is, it is likely that a gay time will be had by all. No one even smiles now at the venerable Lloyd's policy whereby the subject-matter of the policy is set out as being 'the good ship or vessel called the blank', but which may turn out to be anything from a bale of hemp to a fine day. Even if it is a bale of hemp, elaborate provisions are still made for the identification of the master. 'Whereof Blank is master, under God, for the present voyage', the policy reads, 'whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship or the master thereof is or shall be named and called'. Anyone might think that if there were uncertainty about the name of the master, the policy would be void; I need hardly say that I have never known the blank space for the master's name filled in. Lawyers who have been taught from their cradles that every word of the contract must be given its meaning pass over these mountainous obstacles without a tremor. I do not think anyone has ever said anything really unkind about it. Nothing worse than that 'This policy of insurance is a very strange instrument, as we all know and feel': *per* Mansfield C.J. in *Le Cheminant* v. *Pearson* (1812) 4 Taunt. 380.

But the laymen have had a certain amount to put up with also. For many years marine underwriters have 'warranted themselves free' of war risks, which have been separately insured by a body of war risks underwriters who undertook to cover 'consequences of hostilities and warlike operations'—a phrase which goes back at least as far as 1863. In using this phrase it seems obvious that the sort of thing the underwriters had in mind was that wartime conditions would bring into existence numerous additional risks which would render the ordinary premium quite inappropriate and therefore that these risks should be covered by a separate policy and for a separate premium. But these very general words were, as it were, flung out for interpretation by the courts, and so provide a good example of the way in which business men are often content to indicate their notions and leave the rest to the commercial lawyers. As Lord Porter said in *The Coxwold* [1942] A.C. at 714: 'The fact is that there is no form of words in which underwriters and insured can express themselves so as to convey with precision what they mean to include in war risks. Indeed, I do not think that they themselves know exactly what they desire to embrace in the cover furnished, and I fancy that they best convey their intention by using the somewhat vague words in which this present clause is expressed, leaving it to the courts by a series of decisions to determine the line of demarcation between the two forms of risk'. The exegesis of these six words, if all the judgments upon them were gathered together, would fill several volumes of the law reports. One of the first cases to be considered by the House

of Lords—*The Petersham* [1921] 1 A.C. 99—was that of a ship which, sailing without lights under wartime conditions and as required by the wartime regulations, collided with another vessel. A good example, one might think, of the sort of additional risk which the parties had in mind; so much so that in *The St. Oswold* [1917] 2 K.B. 769 Lord Birkenhead, then the Attorney-General, who appeared for the Crown as the war risk insurer, had at p. 771 conceded the point. But in *The Petersham* the House of Lords pointed out with irrefutable logic that it was not a consequence of war at all, but the consequence of a peaceful operation conducted in wartime—a wholly different thing. In *The Matiana* [1921] 1 A.C. 99 two merchant ships collided while they were in convoy. The war risk underwriters seemed at first sight, and to Bailhache J. who tried the case, to be on a bad wicket; the sailing in convoy was a purely wartime expedient and obviously increased the risks of collisions. But in the House of Lords they were doomed to disappointment by a majority of three to two. Sailing in convoy, the House held, affirming the Court of Appeal, might involve a warlike operation but the merchant ships were taking no part in it; 'the sheep are not the shepherd and are not engaged in the operation of shepherding', said Atkin L.J. at [1919] 2 K.B. 698.

Thus it looked at first as if the marine underwriters were going to have to pay for everything. But there was soon to be a dramatic swing of the pendulum. For the courts proceeded to elucidate the consequences of a warlike operation in the following manner. You first identified the operation, *i.e.*, sailing from point A to point B. You next asked yourself whether it was 'warlike' or not. Under this head, carrying ammunition or other military cargo to a war base was held to be a warlike operation. If the operation was warlike, then you asked yourself whether the casualty—the collision or stranding or whatever it was—was a consequence of the operation, that is, of the movement through the water. Observe, not of the warlike character of the operation or of some warlike attribute of it, but of the operation. In other words, the function of the word 'warlike' was deemed to be exhausted once it had identified the operation as being of a class which came within the policy, and it was not to be employed as a guide to the nature of the consequences. The result, as summarised by Lord Porter in *The Coxwold* [1942] A.C., at 719, was 'that almost any casualty befalling a vessel as a result of her own action in proceeding on a voyage, in a case where proceeding on that voyage was a warlike operation, was caused by a warlike operation'. Under the conditions of modern warfare from 1939 onwards, many merchant ships were employed for quasi-military purposes and became, as it was called, 'quasi-warships', whose every movement through the water might cause war damage. It looked as if there were going to be few risks left for the marine underwriters. The courts began to beat a retreat from the extremities of their own reasoning. In *The Coxwold* [1942] A.C., at 713,

Lord Wright sounded the bugle call. 'Logic in law is not exact', he said. It so happened that the previous cases had been concerned with collisions or strandings, and that no casualty caused by heavy weather had been involved. So much subtle thought was expended upon the distinction between a hard object, such as is encountered in a collision or stranding, and a wave, presumably to be classed as a soft object. Things like rocks which had fixed local positions were compared with waves which momentarily rise and then disappear; and it was pointed out that the vessel was an active participant when a collision or stranding occurred but only a quiescent sufferer under heavy weather. It was in *The Coxwold* that Lord Atkin, at p. 700, with a complacency which future generations may regard as excessive, said that nearly every question which could arise on the controversy between marine and war risk had been settled 'to the great convenience of the shipping world, if not with the approval of all their advisers'. Certainly no one had less cause for distress than the lawyer at the course which the controversy took, and cynics might suggest that their convenience was not altogether overlooked. Lord Justice MacKinnon was fond of saying that the lawyers had made more out of these six words than out of the whole of the rest of the dictionary.

I have thought it worth while to spend a little time on this rather abstruse topic, because it is, I think, a good illustration of the danger that besets the relationship between commercial lawyers and commercial men; that the commercial man's vagueness of thought and happy-go-lucky phraseology may have to sustain a weight of logical argument which it was never constructed to bear. This is a point which wants watching if the harmony between commercial men and commercial lawyers is to continue. I shall return to this before I conclude this lecture; but I should like first to examine the other ways in which commercial law and practice are kept together. I have dealt with the ways in which the corpus of commercial law is kept in line with the ideas of commercial men; but there is another important factor to be considered, namely, the manner in which the commercial way of looking at things is kept present to the mind of the lawyer, so that when he is construing a document he has some sort of intuitive idea of the way in which the authors of it regarded the matter about which they were contracting.

The people who deal with litigation are divided into at least three strata. There is the lay client himself, the solicitor and the barrister. In the ordinary legal world the barrister is rather remote from the lay client. He sees him only at conferences; he does not work with him to the extent that the solicitor may do. There is an important and intermediate class of those whom, after the analogy of the quasi-warship, I might call quasi-lawyers. They are the business people who for some reason or another specialise in legal subjects, and the lawyers who serve specific business interests. In

the latter class, there are the legal branches of Ministries and of big business concerns; and although the concern itself is in a sense the client, the real lay client is the particular department that deals with the business. In the former class there are the men who belong to trade bodies and who, as I have said, are often responsible for the drafting of documents; and there are in commercial matters men who act as arbitrators. It is a natural result of specialisation that these divisions should be much less pronounced. In the ordinary legal world, the barrister sees a multitude of solicitors and the solicitor sees a multitude of clients. In the more specialised commercial-legal world the barrister sees very largely the same solicitors and to a considerable extent also the same lay clients, of whose outlooks, habits and ways of business he therefore gets direct and constant experience. In short, the fact that the specialised legal-commercial world is to some extent divided off vertically from the rest of the legal world means that the horizontal divisions within itself are less pronounced.

This is true of any specialised department of legal business no doubt. On the legal-commercial side there are, however, additional factors affecting it. One of the most important of these is the practice of commercial arbitration. Virtually every commercial contract, *i.e.*, every charterparty and every formal commodity contract—not policies of marine insurance—contains an arbitration clause. It is not always invoked. If it is, and one side objects to it, the courts will not enforce it unless the dispute involves some question of fact suitable for law arbitrators—not, for example, if it concerns a pure point of law. Many commercial disputes are dealt with in the first instance by arbitration. These arbitrations fall into two classes. First, there is the purely trade arbitration—for example, a dispute about the quality of goods. Upon matters of this sort, the arbitrator's decision, if properly given, never reaches the courts at all. It is only if he commits some blunder at the hearing which vitiates the result, or if, being so unwise as to state his reasons, an error of law is to be found upon the face of the award, that the courts will intervene. The second class of case is where it is clear that sooner or later the courts will or may have to determine some point of law but where the main dispute is on fact. In such a case the litigants can have the facts finally determined by the arbitral body, subject to the right of either side to ask for a case to be stated upon a point of law. The point is then decided by the court upon the facts found by the arbitrator. In the purchase and sale of commodities the arbitrating body is usually, either in the first instance or perhaps by way of appeal from a single arbitrator, the committee of the trade association. In shipping disputes arising under charterparties and bills of lading, each party selects an arbitrator of its own. He is a person who specialises in advising on disputes and arbitrating if necessary; he may originally have been a broker who has found his way into this

particular class of business. He is regarded by the party who appoints him as their negotiator and advocate. If the two arbitrators cannot dispose of the claim amicably, an umpire is appointed. But before that stage is reached, if legal points are involved, solicitors will have been retained; and if it is plain to them that there is law in it, they will probably suggest to the arbitrators the appointment of a legal umpire, either a solicitor or barrister, and in matters of substance generally a King's Counsel. Thereafter, the arbitrators carry no responsibility for the decision. They could do so if they agreed; but in practice they never regard themselves as free to agree contrary to their clients' interest, and the matter is therefore settled by the umpire. I recollect an action when I was sitting as umpire and at the end of the hearing I asked the arbitrators formally whether there was any point on which they were able to agree; and one of them replied :—'I will agree to anything my counsel says, but not to anything else'. The courts are well aware that arbitrators act as advocates and are even called as witnesses by the party who has appointed them. These practices are ordinarily frowned on, but in commercial matters a good deal of latitude seems to be extended; see *French Government* v. *Tsurushima Maru S.S.* (1921) 37 T.L.R. 961 and *Bourgeois* v. *Weddell & Co.* [1924] 1 K.B. 539. When an umpire has been appointed and counsel are arguing the case before him, there does not seem to be a great deal for arbitrators, who are resolved to disagree, to do. The Arbitration Act of 1934 recognised this and provided by section 5 (2) that after the appointment of an umpire, the court might, on the application of any party, and notwithstanding anything to the contrary in the arbitration agreement, order that the umpire should act in place of the arbitrators and as if he were the sole arbitrator. By this means the parties would be saved the sometimes substantial amounts of the arbitrator's fees. But applications under this section are made rarely, if at all. The parties seem to prefer that the arbitrators should continue to sit with the umpire and use their position to fortify their clients' case. The legal umpire thus has the benefit of their opinion on trade matters. The significance of the practice in the connection in which I am referring to it is that it is yet another way by which the lawyer is kept in touch with the trade and vice versa. The legal umpire hears the views of the trade arbitrators on many points in the evidence. The trade arbitrator sees, as it were from a position on the bench, the law working; and when he comes subsequently to conduct an arbitration on his own he has acquired knowledge of the standards which the law expects.

In what I have just said about the law and practice of commercial arbitrations, you may have observed the control which the law exercises over them largely by means of machinery now contained in the Arbitration Acts, 1889 to 1950, but based fundamentally upon the rule of public policy that no man can by

agreeing to arbitration oust the jurisdiction of the courts. It is worth a short digression to consider that rule. At first sight it might be thought that the law courts should be regarded as a facility available to business men; but that if they find it cheaper or more convenient to settle their disputes finally in some other way, they should be permitted to do so. On questions of fact, that is generally allowed; but the common law insists that it should have the final say on questions of law. If each trade or each market made its own laws there would be no uniformity and might be no publicity. It might be cheaper for the litigants in a particular case, but it would be bad for the community as a whole, for no citizen can arrange his affairs, commercial or otherwise, in accordance with the law, unless its principles are fixed and ascertainable, and departure from them to suit individual cases is forbidden. In *Czarnikow* v. *Roth Schmidt* [1922] 2 K.B. 478, Bankes L.J. said at 484:—'Among commercial men what are commonly called commercial arbitrations are undoubtedly and deservedly popular. That they will continue their present popularity I entertain no doubt, so long as the law retains sufficient hold over them to prevent and redress any injustice on the part of the arbitrator, and to secure that the law that is administered by an arbitrator is in substance the law of the land and not some home-made law of the particular arbitrator or the particular association'. Scrutton L.J. at 488 said:—'There must be no Alsatia in England where the King's writ does not run'. These were the considerations doubtless which moved our ancestors to absorb the custom of merchants into the common law.

After the lay arbitrators, and closer than them to the law, there come solicitors and counsel. It is, I think, less common than it used to be for solicitors in general practice to advise on points of law; they are tending in matters of substance to be the link connecting counsel with the lay clients. But the well-known firms of commercial solicitors stick to the old tradition. Most of the partners are expected to give, and do give, a sound opinion on any ordinary point of commercial law. Counsel, particularly the Junior Bar, are not dealing with casual clients; the lay clients are people whom they meet frequently. Finally, since the commercial list was first started, there has always been on the King's Bench and available to take charge of the list, at least one (and generally more than one) man who has practised extensively at the commercial bar and who has not left behind him his knowledge of business habits and ways of thought. Outside the immediate sphere of the law all these people may meet at professional functions. They belong to bodies such as the British Maritime Law Association, whose main business it is to confer with similar bodies in other countries and reach agreement upon common questions of law. The late Lord Justice Scott did conspicuous work in this field.

The dictum in 1475, which I have already cited, refers to speed and simplicity as well as to harmony between law and practice. It would not be out of place, I think, if I were to state shortly what is done under modern conditions and through the agency of the commercial list to give speed and simplicity. The Commercial Court, as it is generally called, was constituted in 1894, so that it has now operated for just over a half century. It has no binding rules, either of law or of practice and procedure, which differentiate it from the other courts of the King's Bench. But the judge exercises his judicial powers in such a way as to give to the commercial litigant advantages which the ordinary litigant does not always have. In the first place, every case has a day fixed for it; and subject to the business of the court the parties can have what date they choose. In an urgent case, if the judge in charge of the list is not free, another judge with commercial experience will probably be available to take it upon an early date. But commercial litigation is not what it was in the halcyon days for lawyers after the 1914-18 war. The judge who is put in charge of the commercial list now rarely has his full time occupied with commercial cases. Nevertheless a judge is still kept available and the result is that it is possible for litigants to obtain a date very easily. Speed is thus very much a matter of what the parties or their solicitors choose to make it. I recollect a case last year which involved a substantial matter, for it lasted several days, and which was tried before a City of London Special Jury just three months after the issue of the writ.

The second feature is that all interlocutory proceedings come forthwith before the judge. In the ordinary King's Bench action most of these are dealt with in the first instance by the Master. The advantage of having access to the judge direct is not merely or mainly that it eliminates a set of proceedings before the Master; it is that in dealing with interlocutory matters the parties are in the presence of the judge who may be conducting the trial. Most schemes for reducing the costs of legal proceedings recognise the advantage of having someone who can in the early stages, if I may use the phrase, knock the parties' heads together, and have included it as one of their features. Interlocutory proceedings are generally conducted in an atmosphere of unwillingness to make concessions or to co-operate. This is partly because the legal representatives conceive of themselves as engaged in the preliminary skirmishes of a campaign and think perhaps that their clients will judge of their value by the zeal and pugnacity which they display; and partly because there is a natural reluctance for a man who may not be in charge at the trial to give way on matters which, though they do not appear important, might turn out later to have some significance which he has missed. But when suggestions as to what is reasonable or unreasonable come from the Bench, and what is more from the judge who may be trying the case, the

parties are apt to accept them and the lay clients to approve. Thus the judge is often able to get rid of formalities, upon which the parties may have a strict right to insist, but which might lengthen the proceedings. This is particularly true in relation to matters of evidence, dispensing with foreign witnesses, treating documents as evidence of their contents and so on. Interlocutory disputes are discouraged. Applications for particulars of statements of claim for example—a great source of preliminary battles in ordinary cases—are not welcomed. Mere litigiousness is firmly discouraged. Indeed so habituated are practitioners to these ways, which conform to their own ideas of how litigation should be conducted, that these standards are generally observed. They are now so well established that it is unnecessary to resort to the robust methods which some judges practised in the early days. I recollect many years ago counsel beginning the first sentence of what was obviously intended to be a very lengthy address with :—'My Lord, this is an application for particulars'; and being interrupted by :—'So I see. And a very silly application too. It is dismissed with costs'.

But the judge exercises his powers within the ordinary framework of the rules and there is no special treatment provided for commercial causes. The position is made abundantly clear in a judgment by Greer L.J. in *Theatrical Investments* v. *Frew* (1937) 58 Ll.L.R. 95, from which it is worth taking a long quotation :—'In this case, the appellants appeal from an order for particulars made by Mr. Justice MacKinnon, now Lord Justice MacKinnon, in Chambers, in an action proceeding in the Commercial List. It is frequently spoken of as the Commercial Court. There is no such court. There is a King's Bench Court to which a judge is assigned to take the Commercial List, and the principles applicable in any case in the King's Bench Division are equally applicable to cases that are put into the Commercial List. . . . No doubt the learned judge, with his experience of cases in the Commercial List, has had cases of particulars being ordered which were not strictly within the rules of the court, but it is usual for those who appear in the Commercial Court to assent to whatever the judge thinks it is convenient to order, and doubtless the learned judge made the order on the assumption that there would not be any serious opposition to it. I was trying cases in the Commercial List for several years before I came to this court, and I know the absolute trust as between the judge and those who practise in that court; and frequently it is assumed that there will be assent to the order which is suggested by the learned judge, and therefore no doubt in some such way Mr. Justice MacKinnon thought that, at any rate, the convenience of the litigation would be served by the order which he made. But inasmuch as he did not consider the wording of rule 7B and its application to the case that was before him, I think we ought to reverse the order'.

The fixing of days and the use of a judge for all interlocutory applications involves what would normally be considered to be a wasteful and luxurious use of what is now described as judicial manpower. The commercial litigant is thus exceptionally favoured.

There remains however the constant danger, to which I have already alluded, of the ideas of lawyers and of commercial men moving apart. The tendency of the lawyer is always to codify. Consider the c.i.f. contract. In the celebrated case of *Ireland* v. *Livingstone*, Blackburn J. laid down the essentials of this form of contract. At the time when he stated them, there is no doubt that he stated accurately the practice of business men. But the practice changes, while judicial statements of this sort tend to be canonised. Thus he stated that it was the duty of the seller to deliver to the buyer the shipping documents consisting of the bill of lading, a policy of insurance and a provisional invoice. Take the policy of insurance. Few traders nowadays take out separate policies of insurance for each consignment of goods. They have a floating policy under which they make declarations in respect of particular shipments. Or if they have a separate policy to cover the shipment they may want to split the shipment up into separate parts. Thus they generally tender a certificate of insurance, or even a letter stating that the goods are in fact insured, and such documents are quite acceptable in the trade. But if a seller were to tender such a document unless his contract gave him liberty to do so, the buyer would be entitled to reject. So nearly every contract provides as a matter of course for the tender of policies and/or certificates and/or letters of insurance ('and/or' is a verbal concoction dear to the hearts of business men). Since the practice is now virtually universal, it seems to me a pity that the law should insist upon the inclusion of the specific provision and penalise the accidental omission of it. This is the sort of point upon which the law should, so it seems to me, be alert to keep in touch with the changing developments of modern practice. I cannot believe that Blackburn J. intended his words to constitute a rigid and permanent definition.

Similar questions are beginning to arise under modern practice upon the nature of the document of title to the goods. The delivery order is coming more and more into use and many c.i.f. contracts stipulate that the tender of it should be regarded as a good shipping document. Where, for example, there is a number of purchasers of grain loaded in bulk, it becomes inconvenient and cumbersome to take out separate bills of lading for each. It is more convenient to take out one bill of lading to the order of the seller's agent at the port of delivery and leave him to issue delivery orders to different buyers. This may raise difficult problems of the sort that were illustrated recently in the case of *Comptoir D'Achat* v. *Belgian Grain Co.* [1949] A.C. 293. The delivery order is not a document of title and cannot therefore pass the property in

unappropriated goods as can a bill of lading. The law would move with the development of practice if it permitted the delivery order to be treated as a negotiable instrument and a document of title. This is theoretically possible; but while the law has never slammed the door upon any new candidates for negotiability any more than it has upon new heads of public policy, it tends to treat both with suspicion; and few counsel would feel much confidence nowadays in any case which depended upon an addition to either of these 'charmed circles'. I take that phrase from the latest public policy decision: *Monkland* v. *Jack Barclay Ltd.* [1951] 1 All E.R. 714 at 723. This is, I feel, to be regretted.

It is worth returning to the point about insurance documents and examining it a little more carefully; for the cases in relation to it illustrate the way in which the infiltration of new business practice into the law through the proof of custom has been dammed. In one of the early cases, decided before *Ireland* v. *Livingstone*, *Tamvaco* v. *Lucas* (1861) 1 Best & Smith 185, it was contended that the policy of insurance must be for the value stated in the provisional invoice. It was decided by the judges in the Queen's Bench, including Blackburn J., that this was not the proper construction of the contract. On appeal to the Court of Exchequer Chamber reported in 3 Best & Smith, p. 89, the point was dealt with very summarily. The court said the judgment was to be affirmed. 'Whether the delivery of such documents as were here delivered was a compliance with the contract to deliver the shipping documents was not a question of law, but of fact, which had been determined by the jury against the defendants.' It might have been thought therefore that the question whether the delivery of a certificate or letter of insurance was a compliance with a contract might also be left to a jury of business men. But the point appears not to have been raised until 1919; by that time juries had gone out of fashion and the judgment of Blackburn J. in *Ireland* v. *Livingstone* had been sanctified by age. In *Manbre Saccharine* v. *Corn Products* [1919] 1 K.B. 198 an attempt was made to argue before McCardie J. that a buyer was not entitled to a separate policy of insurance covering the contract goods, and that a tender of a policy covering other goods as well was valid. McCardie J. said at p. 206 that he would have dealt with the point in a few words 'but for the fact that Mr. MacKinnon and Mr. G. A. Scott boldly and vigorously argued that a vendor's duty under a c.i.f. contract, whatever it may have been in former times, had been modified by recent practice amongst business men. It may be that the requirements of a c.i.f. contract can be altered by general and established custom. For inasmuch as the meaning of such a contract was created by custom, it may likewise, I presume, be altered by custom. But the evidence of a modifying custom must be clear indeed ere the well-known incidents of such a bargain as a c.i.f. contract can be changed. Here the defendants abandoned any attempt to prove a general

custom which could lessen their prima facie obligations to the plaintiffs'. The learned judge then disposed of an argument that there was a special usage or practice between the parties themselves. In *Wilson Holgate* v. *Belgian Grain and Produce Co.* [1920] 2 K.B. 1 it was contended that the buyer was obliged to accept a certificate of insurance together with a broker's undertaking to hold the policy to his account; and this contention was negatived. Bailhache J., who had an unrivalled experience as a commercial judge, began his judgment by saying that it was one which as a judge in the Commercial Court he was reluctant to deliver, because it gave effect to an objection as to which commercial men in the City of London might well complain that it was a merely technical objection. He said that it had been settled since the judgment of Blackburn J. that the documents which the seller was bound to tender were a bill of lading, an invoice and a policy of insurance. He went on, at p. 7:—'Counsel for the plaintiffs have called a number of witnesses of high standing in the City of London, to whose evidence I give absolute credence, all of whom have stated that it is the common practice nowadays for sellers to tender, instead of a policy of insurance, a broker's cover note or a certificate of insurance. . . . These witnesses, however, could give no instance in which there has been any contest as to the validity of a tender of a cover note or certificate, still less did they give any instance in which, on a buyer's demand for and insistence upon a policy being resisted he has given way. On the contrary, these witnesses were all very careful to explain that they were not prepared to say that the buyer was bound to take a cover note or certificate instead of a policy of insurance. All that they could say was that so far as they knew these cover notes and certificates were constantly taken and never refused'. He held therefore that no custom had been proved and said that he was bound to give effect to the defendants' objection, though he did so most unwillingly. In *Diamond Alkali Export Corporation* v. *Fl. Bourgeois* [1921] 3 K.B. 443 McCardie J. reiterated his view that a document of insurance is not a good tender in England under an ordinary c.i.f. contract unless it be a policy; and added at p. 457:—'It may well be that this decision is disturbing to business men'.

This series of decisions shows the extent to which the courts have mortified custom. A judge will let business practice influence his mind intensely in the construction of a business contract; but he cannot easily allow it to contradict or add a new matter to the language which the parties have used. This attachment to the written word, which is so naturally and inevitably a part of the legal system, creates one of the sharpest differences between legal and business ways of thought. The business man is prone to treat the formal contract, a document which he does not always bother to read, as being merely the seal that is set upon a course of negotiations between himself and the other party in which he thinks

that he has achieved a common understanding. I have had business men in my chambers, when at the Bar, who, when a particular point of difference arose, have said how it would be solved according to the customary practice in the trade. 'But', I have interjected, 'that is not what the contract says.' 'Oh, the contract, let me see it', and when his attention is directed to the document which he has signed, and which he is probably considering in any detail for the first time, he is apt to say:—'Well I cannot help that; I told you the way things are always done'.

It may be impossible to effect a complete reconciliation between these two opposing attitudes of mind. Business men as a rule like the idea of the written contract; it gives them the feeling that they have tied the deal up. But they cannot give the time and thought that is necessary for the drafting of precise and comprehensive terms, and they have little inclination for the task. They like the solemnity of the contract but do not care about its details. To the lawyer the written word has the supreme merit of certainty and permanence; and he therefore presumes it to be the final embodiment of the wishes of the parties. In English law, though not, I think in most continental systems, it excludes and renders inadmissible evidence of what has gone before. This gives to a contract a rigidity under which the business man sometimes chafes. I think that the law might go further than it does towards meeting the business attitude. In particular a more generous admission into the contract of custom and trade practice would be entirely in keeping with the basic principles of the law merchant and with the traditions which lie at the heart of the common law.

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PROTECTION OF JUSTICES

PUBLIC attention has recently been drawn to the office of lay magistracy by the passage through Parliament of the Justices of the Peace Act, 1949. Discussion has not, however, yet ranged so far as to cover the position of a justice of the peace who is sued by a person who, justifiably or unjustifiably, is enraged by some act done by a justice in the course of his official duties. The defendant would scarcely be reassured by the present state of the law on the subject.

The source of the confusion is section 1 of the Justices' Protection Act, 1848 (reproduced in Northern Ireland by the Justices' Protection (Ireland) Act, 1849, s. 1), which provides :

> Every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort ; and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause ; and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be non-suit, or a verdict shall be given for the defendant.

Coleridge J. described the Act as exceedingly ill-worded,[1] and more than a hundred years after it was passed its true interpretation remains a matter of considerable doubt. It is proposed here to consider some of the meanings which have been attributed to the section, with a view to pointing the issues involved. The words which cause the greatest trouble are ' within his jurisdiction as such justice '.

One possible interpretation of the phrase ' within his jurisdiction ' is : ' which he did lawfully and properly in the course of judicial office ' ; it is difficult, however, to believe that a justice who heard a case properly, decided it properly and made a proper order would be liable to an action for damages simply because he took a malicious delight in the whole transaction though for no reasonable and probable cause ; and, indeed, no decision on the section goes to such lengths. As Coleridge J. remarks, in *Barton* v. *Bricknell*,[2] the Act ' assumes that the justice has been guilty of some irregularity, or he would not need protection '. Indeed, it seems to be generally assumed that a justice does not require protection unless he has done something wrong. ' Justices of the Peace are not protected to the same extent as judges, and by Jervis' Act [3] an action lies against

[1] *Barton* v. *Bricknell* (1850) 13 Q.B. 393 at p. 395. [2] 13 Q.B. 396.
[3] The Act referred to is the Justices' Protection Act, 1848. Three Acts passed in 1848 concerned with justices of the peace are collectively known as *Jervis's Acts*.

them for *wrongful*[4] acts done maliciously or without reasonable and probable cause within their jurisdiction'.[5] This view is, in effect, that section 1 of the Act protects a justice in respect of errors, irregularities and informalities committed while doing what he has jurisdiction to do, but not maliciously wrongful acts done in the course of some otherwise proper transaction, nor acts completely outside the jurisdiction, which are covered by section 2.

Much support can be found for this view. In *Linford* v. *Fitzroy*[6] it was held that a wrongful refusal of bail on a charge of misdemeanour was not actionable in the absence of malice, as granting bail was a matter within the general jurisdiction of the justice. If this interpretation is correct, then the distinction between section 1 and section 2 appears to be that section 1 applies to mere irregularities, while section 2 covers acts which could not, even if properly done, be within the jurisdiction. This is sustained by *Ratt* v. *Parkinson*[7] where, although a warrant was in certain respects informal yet, as the justices had in other respects acted within their jurisdiction, it was held that they were entitled to protection under section 1. Jervis C.J. said[7]: 'If necessary, the court might perhaps draw a distinction between sections 1 and 2. But it is not necessary. Were it so, I confess I should be inclined to think that "exceeding his jurisdiction" in section 2 means assuming to do something which the Act under which he is proceeding could by no possibility justify'. The distinction is well brought out in *Barton* v. *Bricknell*[8]: the defendant, a justice of the peace, had convicted the plaintiff in a penalty of five shillings with eleven shillings costs, the sums to be levied by distress and, if there were insufficient distress, the plaintiff was to spend two hours in the stocks. Distress was levied, but the conviction was subsequently quashed on the ground of lack of jurisdiction to order the stocks in such a case. The plaintiff now brought an action of trespass in respect of the distress on the ground that the mention of the stocks had vitiated the conviction ab initio. The court held the defendant protected under section 1. In the course of his judgment Erle J. said[9]: 'If anything had been done in respect of the wrongful order, it would have been an act beyond his jurisdiction: but there was nothing of the sort. It was a mere error as to the manner in which the conviction should be framed, which caused the justice to draw it up in a wrong form; and, on account of the formal defect, the conviction was quashed. I think the case is precisely that which section 1 was intended to protect. Then I think the construction of section 2 must be so

[4] Italics mine.
[5] E. W. Ridges, *Constitutional Law of England*, 6th ed., p. 29.
[6] (1849) 13 Q.B. 240. And see *Somerville* v. *Mirehouse* (1860) 1 B. & S. 652.
[7] (1851) 20 L.J.M.C. 208.
[8] (1850) 13 Q.B. 393. And see *Leary* v. *Patrick* (1850) 15 Q.B. 266, a case on s. 2.
[9] 13 Q.B. 398.

controlled by section 1 as to be consistent with it; and that is done by so construing section 2 as to confine its application to cases in which the cause of action arises from the excess of jurisdiction, as it would have done in this case if the plaintiff had been put in the stocks, and he had brought the action for that'. This distinction was also accepted in *Taylor* v. *Nesfield*.[10]

Various other cases and dicta adhere to this general application of section 1. In *Haylock* v. *Sparke*[11] Lord Campbell C.J. states: 'upon the whole, it appears to us that a justice of the peace has jurisdiction to require sureties for good behaviour in some cases of libel against individuals. If that be true, the defendant had jurisdiction in the matter out of which this cause of action arises. And, though the proceedings were informal, and although there was in our opinion a great want of discretion in requiring sureties upon such an occasion, it follows that an action of trespass will not lie'. The same learned judge takes the same point of view in *Kendall* v. *Wilkinson*,[12] where Coleridge J. said[13]: 'The plain object of the statute was to give magistrates entire protection in regard to acts done, however irregularly, if within their jurisdiction, unless malicious and without probable cause'. To the like effect is *Bott* v. *Ackroyd*,[14] where the defendant, a justice, had left a blank in the conviction for the amount of the costs to be filled in later, and had signed it in that state. The blank was subsequently filled in by the clerk: it was held that the signing in blank by the defendant was a mere irregularity and not an excess of jurisdiction and that he was protected under section 1. Finally, in *Pease* v. *Chaytor*,[15] Blackburn J. suggested that justices would be safely within section 1 if they proceeded to exercise a jurisdiction in the erroneous belief that some fact existed which gave rise to the jurisdiction. This seems to be going almost as far as to say that a person is within his jurisdiction so long as he honestly believes himself so to be.[16] Perhaps the best statement of the shade of meaning to be derived from these cases is that of Halsbury's *Laws of England*[17]: 'The phrase "acting within their jurisdiction" means where the justices have acted with such irregularity as to be liable for exceeding their jurisdiction, but the irregularity is comparatively trivial or, in other words, means acting just outside their jurisdiction'.

[10] (1854) 3 E. & B. 724. And see *Newbould* v. *Coltman* (1851) 6 Ex. 189, where it was held that s. 1 'does not apply to a state of facts where the party had no general jurisdiction'.
[11] (1853) 1 E. & B. 471 at p. 488.
[12] (1855) 4 E. & B. 680 at p. 689.
[13] 4 E. & B. 692.
[14] (1859) 28 L.J.M.C. 207.
[15] (1861) 1 B. & S. 658 at pp. 673–4. And see *Palmer* v. *Crone* [1927] 1 K.B 804; Halsbury, *Statutes of England*, 2nd ed., Vol. 14, p. 802.
[16] Or, as put in Halsbury, *Statutes of England*, 2nd ed., Vol. 14, p. 802, 'Justices are not liable unless they know or ought to know of the lack of jurisdiction'. This is the same rule as for superior judges.
[17] 1st ed., Vol. 23, p. 333.

Strongly supported though this statement is, it must be tested in the light of the common law before the Act. It must presumably be shown that to give it this interpretation is to extend some protection to justices which they did not have before. That is the avowed intention of the Act, whose preamble recites that ' it is expedient to protect justices of the peace in the execution of their duty ', and whose long title proclaims it to be ' An Act to protect Justices of the Peace from vexatious Actions for Acts done by them in Execution of their Office '. Jenks [18] maintains in emphatic terms that that is just what the Act did : ' The third of Sir John Jervis' Acts, the " Justices' Protection Act ", by a very rare exception from the " Rule of Law ", granted in recognition of the unpaid services of the bulk of the magistracy, mitigates, to a certain extent, the sharpness of the common law rule, that even for a mere technical breach of the law, innocently committed in the exercise of his functions, a magistrate is personally liable to the injured party '.[19] There is some, but rather scanty, support for this picture of a tyrannical common law. In *R.* v. *Palmer and Baines* [20] the court certainly did indicate that an action would lie against a justice who committed a technical illegality : ' Even where a justice of peace acts illegally, yet if he has acted honestly and candidly, without oppression, malice, revenge or any bad view or ill intention whatsoever, the court will never punish him in this extraordinary course of an information ; but leave the party complaining, to the ordinary legal remedy or method of prosecution, by action or by indictment '. It seems likely, however, that the court was thinking of circumstances in which the defendant justices had no jurisdiction at all in the matter complained of, and that that is the true explanation of other cases which seem to support Jenks, such as *Weston* v. *Fournier*,[21] *West* v. *Smallwood*,[22] *Wilkins* v. *Hemsworth* [23] and *Calder* v. *Halket*.[24]

Cases before the Act, in general, favour the view that at common law no action lay against a justice of the peace for an act within his jurisdiction unless there were an irregularity maliciously committed, though there are some cases that point to absolute immunity on a par with superior judges. The distinction between acts done erroneously and acts done maliciously was drawn as early as 1589 in *Windham* v. *Clere*,[25] where it was stated : ' If a man be accused to a justice of peace for an offence, for which he causes him to be arrested

[18] *A Short History of English Law*, p. 349.
[19] Cf. Sir W. S. Holdsworth, ' Immunity for Judicial Acts ', *Society of Public Teachers of Law Journal*, 1924–28, p. 17, who is much more cautious, but does not make it clear whether he thinks malice a necessary ingredient of the action he says might exist.
[20] (1761) 2 Burr. 1162.
[21] (1811) 14 East 491.
[22] (1838) 3 M. & W. 418.
[23] (1838) 7 A. & E. 807.
[24] (1839) 3 Moo.P.C. 28.
[25] Cro.Eliz. 130.

by his warrant, although the accusation be false, yet he is excusable; but if the party be never accused, but the justice of his malice and own head cause him to be arrested, it is otherwise'. Here, an action on the case was successful, though it was later settled [26] that where a justice of the peace maliciously granted a warrant against another, without any information, the appropriate form of action (if any) against the justice was trespass and not case. In respect of the Court of the Marshalsea, the distinction was taken in Coke's time between an erroneous irregularity and a complete absence of jurisdiction. 'When a court has jurisdiction of the cause, and proceeds inverso ordine or erroneously, no action lies against the party who sues, or the officer or minister of the court, who executes the precept or process of the court; but when the court has not jurisdiction of the cause, the whole proceeding is coram non judice, and an action will lie against them without any regard of the precept or process'.[27] In *Gerlington* v. *Pitfield* [28] it was said that very strict proof of malice was necessary when suing a justice for his part in a prosecution within his jurisdiction. In *Lane* v. *Santeloe* [29] an action on the case for malicious prosecution succeeded against a justice, but the jury took the strange (and subsequently held to be wrong [30]) course of awarding two hundred pounds damages against the prosecutor and only twenty pounds damages against the justice.

Despite these decisions, which in any case were few and scattered, Lord Mansfield doubted at first whether an action ever lay against a justice for an irregularity within his jurisdiction. In *R.* v. *Young* [31] he said: 'But if it clearly appears that the justices have been partially, maliciously or corruptly influenced in the exercise of this discretion, and have (consequently) abused the trust reposed in them, they are liable to prosecution by indictment or information; or even, possibly, by action, if the malice be very gross and injurious'. However, a year later, in *R.* v. *Fielding*,[32] the court assumed that an action would lie. The same assumption was present in *Burley* v. *Bethume*,[33] where it was laid down that in an action for malicious prosecution against a justice the burden was on the plaintiff to prove, over and above his innocence, that there was no probable cause for the conviction. Finally, there is a very clear-cut and wide statement by Tindal C.J. in *Cave* v. *Mountain* [34]: 'No case can be found in which a magistrate, acting within his jurisdiction, has been held liable in an action of trespass for a mere error in judgment. It would be a very different case if the defendant had acted

[26] *Morgan* v. *Hughes* (1788) 2 T.R. 225.
[27] *The Case of the Marshalsea* (1612) 10 Co.Rep. 68b.
[28] (1660) 2 Keb. 572.
[29] (1718) 1 Stra. 79.
[30] *Lowfield* v. *Bancroft* (1731) 2 Stra. 910.
[31] (1758) 1 Burr. 556 at pp. 561–2.
[32] (1759) 2 Burr. 719.
[33] (1814) 5 Taunt. 580.
[34] (1840) 1 Man. & G. 257 at p. 263.

from any malicious or improper motive, or with any want of bona fides, in which case he would be liable, in a different form of action '.[35]

If these cases accurately represent the common law before the Act, it is difficult to see what additional protection was given to justices in respect of judicial irregularities, beyond the procedural advantages, such as the right to notice of the action under section 9. On the other hand, it is hard to believe that these, together with the conversion of some trespasses into case, would be sufficient to stop the alleged vexatious actions (of whose existence, in any case, there is no evidence in the reports; actions against justices in respect of judicial acts appear at all times to have been rare). What is more, there is some authority for saying that at common law there was complete immunity for judicial acts within the jurisdiction.

Superior judges have beyond doubt always been immune from suit except in respect of acts done totally without jurisdiction, and the burden of proof is upon the plaintiff to show lack of jurisdiction.[36] The judge, being the King's judge, is answerable only to the King.[37] In *Taaffe* v. *Downes*[38] an action against the Chief Justice of Ireland failed on that ground, and in *Dicas* v. *Lord Brougham*[39] a similar action against the Lord Chancellor was unsuccessful.

There is, however, but little judicial authority for saying that this immunity extends to justices of the peace, and Holdsworth has drawn attention to the historical explanation of this distinction.[40] But, counsel objecting, Windham J. in *Green* v. *Hundred of Buccle-churches*[41] doubted whether an action lay against a justice who refused to examine a boy under the Statute of Hue and Cry, ' because a Justice of the Peace is a Judge of Record and no action lies for what he does as judge '. Counsel did not dispute the general proposition, but argued that the function of examining under the statute was ministerial and not judicial. This distinction is also taken by Hawkins[42] in a passage quoted by counsel for the defence in *Mills* v. *Collett*[43]: ' Justices of the Peace are not punishable civilly for acts done by them in their judicial capacities; but if they abuse the authority with which they are entrusted, they may be punished criminally at the suit of the king, by way of information. But in case where they proceed ministerially, rather than judicially, if they act corruptly they are liable to an action at the suit of the party, as well as to an information at the suit of the king '. An

[35] See also *Hamilton* v. *Anderson* (1858) 3 Macq. 363, where the same principle was applied to a sheriff-substitute.
[36] *Peacock* v. *Bell* (1667) 1 Saund. 73. Cf. *Carratt* v. *Morley* (1841) 1 Q.B. 18: the burden of proof is different in the case of inferior judges.
[37] *Floyd* v. *Barker* (1608) 12 Co.Rep. 23; *Hamond* v. *Howell* (1678) 2 Mod. 218.
[38] (1813) 3 Moo.P.C. 36n.
[39] (1833) 6 C. & P. 249.
[40] ' Immunity for Judicial Acts ', *S.P.T.L. Journal*, 1924–28, pp. 17–21.
[41] (1589) 1 Leon. 323.
[42] 3 Hawk.P.C. c. 8, s. 74.
[43] (1829) 6 Bing. 85.

even stronger statement is made by Burn [44] : ' It may be laid down as a general rule that if a justice of the peace in or out of sessions has jurisdiction over the subject-matter before him, and acts judicially, he is not liable to an action for any act done under it, however erroneous the conclusion at which he arrives may be. Nor is he liable to an action, however corrupt or malicious his motives were in coming to that conclusion, the only remedy in such latter case being by information at the suit of the Queen '. Counsel for the plaintiff in *Gelen* v. *Hall*,[45] having read that passage, argued that while it might be true where the justice was acting as a judge of record, as at quarter sessions, it was not applicable to magistrates at petty sessions. The court expressly declined to decide this point, and found themselves able to grant a new trial without doing so. Sir Percy Winfield [46] points out that there are two Year Book cases [47] in which it was said that no action lay against a justice for acts within his jurisdiction, and that Lambard [48] mentions criminal remedies against justices, but is silent with regard to civil actions.

Thus, there is some doubt as to the common law before 1848. But the common law may, independently of the passing of the Justices' Protection Act, 1848, have become settled since that date. That is a possibility to which further reference will be made later.

Before the passing of the Act, the common law beyond doubt accorded complete immunity to a justice from suit in respect of a subsisting conviction. In *Brittain* v. *Kinnaird* [49] it was decided that in an action against a magistrate, a conviction by him, if no defect appeared on the face of it, was conclusive evidence of the facts contained in it.[50] Again, in *Basten* v. *Carew*,[51] production of the record, which had no defect on the face of it, was held a complete answer to such an action. Abbott C.J. said [52] : ' It is a general rule and principle of law, that where justices of the peace have an authority given to them by an Act of Parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they were required by the Act to do in order to originate their jurisdiction, a conviction drawn up in due form, and remaining in force, is a protection in any action brought against them for the act so done '.

44 *Justice*, tit. Justices of the Peace, 29th ed., p. 1027.
45 (1857) 2 H. & N. 379 at p. 388.
46 *Present Law of Abuse of Legal Procedure*, p. 217. And see J. Dickinson, *Administrative Justice and the Supremacy of Law*, pp. 36–47.
47 Pasch. 9 Edw. 4, f. 3; Hil. 9 Hen. 6, f. 60.
48 *Eirenarcha*, pp. 370, 630, 631.
49 (1819) 1 Brod. & Bing. 432. And see *Gray* v. *Cookson* (1812) 16 East 13.
50 This bald statement in the judgments is contrary to the principle enunciated in *Bunbury* v. *Fuller* (1853) 23 L.J.Ex. 29 at pp. 35–6 (*per* Coleridge J., delivering the judgment of the Court of Exchequer Chamber), and *Hollington* v. *Hewthorn & Co., Ltd.* [1943] K.B. 587. Presumably, then, the rule laid down in *Brittain* v. *Kinnaird* must be taken to be no wider than that in *Basten* v. *Carew*, *infra*. Cf., however, *The State (Gorman)* v. *Wicklow Circuit Judge* [1949] Ir.R. 275, a recent case in the Republic of Ireland.
51 (1825) 3 B. & C. 649.
52 3 B. & C. 652–3.

This immunity has not been held to extend to cases where the justices are not acting as judges of record,[53] but it has not been doubted in respect of the type of case mentioned. Yet section 1 of the Justices' Protection Act, 1848, does not require either an irregularity apparent on the face of the conviction or the quashing of a conviction before an action can be brought in respect of it, though the latter is made a condition precedent to any action under section 2! Little wonder that Platt B., in *Kirby* v. *Simpson*,[54] thought that Parliament had got it the wrong way round. It seems at least possible that there is less protection for judicial acts under the statute than there was at common law.

Common law, furthermore, did not envisage liability on the part of a justice for wrongful ministerial acts of officers of the court done under valid judicial orders. In *Tinsley* v. *Nassau*[55] it was held that trespass would not lie against a sheriff for the act of his bailiff in taking the goods of one person under a warrant from the sheriff against the goods of a different person in execution of a judgment of the county court. 'I think the sheriff is a constituent part of the county court, and issues his warrants as [*sic*] a judicial character.'[56] The same rule was applied in *Bradley* v. *Carr*[57] to the steward of a hundred court. There does not appear to be anything in section 1 to alter this position.

Returning now to the development of the common law after 1848, there is an interesting passage in Winfield,[58] who writes: 'It will be observed that the section[59] nowhere creates any remedy, but merely assumes the existence of one. If, therefore, it can be proved that there is no such remedy at Common Law, Justices of the Peace are not liable. Moreover, the Common Law is organic and is constantly developing and changing. Therefore, it does not follow that because there may have been a civil remedy at Common Law in 1848 (the date of the passing of the Act) against Justices of the Peace for acts done in the execution of their duty, there is any such remedy at the present day. For the Common Law may have changed on this point, and may have reached the conclusion that there is no such remedy. If that be so, the Act of 1848 merely regulates what does not exist. True, it assumes that there is such an action, and labels it an action on the case. But if the assumption be unfounded, section 1 only baptises something that never existed or has since died'.

This suggestion presents an attractive way out of the dilemma in which some writers about the Act find themselves. Even if there was an action before 1848, the value of the Act is difficult

[53] See *per* Holroyd J., *Basten* v. *Carew* (1825) 3 B. & C. 649 at p. 657.
[54] (1854) 10 Ex. 358 at p. 367.
[55] (1827) Mood. & M. 52. And see *Metcalfe* v. *Hodgson* (1632) Hut. 120; *Holroyd* v. *Breare* (1819) 2 B. & A. 473.
[56] *Per* Best C.J., Mood. & M. 54.
[57] (1841) 3 Man. & G. 221.
[58] *Present Law of Abuse of Legal Procedure*, p. 217.
[59] Section 1 of the Justices' Protection Act, 1848.

enough to assess, as the Act does not seem to limit actions any further than the common law. But if there was no action, the Act is meaningless. One difficulty at least evaporates if one can say that the Act was not completely meaningless when passed but has become superfluous since. Apparently contradictory or tentative statements, such as those of Robson,[60] Wade and Phillips,[61] and Halsbury (*Statutes of England*)[62] would be explained.

This avenue requires exploration. *Gelen* v. *Hall*[63] forms a good starting point. This case was, as Winfield[64] remarks, entirely inconclusive, but that learned writer suggests that it may be regarded as a turning point, leaving the way clear for the common law to extend the judicial immunity of superior judges to justices of the peace. The complete immunity of superior judges when acting judicially within their jurisdiction is well settled.[65] The Judicial Committee of the Privy Council held in *Haggard* v. *Pélicier Frères*[66] that it extended to a British consular court in Madagascar, not a court of record. Holdsworth[67] regards this as favourable to a further extension of it to justices of the peace, but the case is equivocal on that point, as it expressly refers to the immunity in question as that accorded by the law of England to the judge of a *court of record*.

A more rewarding search can be made into the cases on slander, where an action is brought for defamatory words spoken in the course of judicial proceedings. No action can be sustained in respect of such utterances made by any person participating, however false and malicious the statement may be. This was laid down in respect of county court judges in *Scott* v. *Stansfield*,[68] witnesses in *Seaman* v. *Netherclift*,[69] advocates in *Munster* v. *Lamb*,[70] and a judge of the Supreme Court of a colony in *Anderson* v. *Gorrie*.[71]

[60] *Justice and Administrative Law*. At p. 50, Professor Robson seems to favour the view that justices are completely immune at common law in respect of judicial acts within their jurisdiction. However, at p. 52, he writes: 'This protective mantle thrown over the judge's shoulders is a garment that was woven by the common law, though the fabric has from time to time been strengthened by Acts of Parliament' such as the Justices' Protection Act, 1848.

[61] *Constitutional Law*, 2nd ed., p. 258, where the learned authors regard it as probable that exactly the same immunity as is enjoyed by courts of record extends to inferior courts not of record, but make the reservation that it can be argued that justices of the peace are liable for the malicious exercise of their powers even within their jurisdiction, this argument resting upon the Justices' Protection Act, 1848.

[62] 2nd ed., Vol. 14, pp. 801–2: 'There can be no action in respect of anything done by a magistrate within his jurisdiction'. And later in the same note: 'If the magistrate acts within his jurisdiction, no action lies without proof of malice'.

[63] (1857) 2 H. & N. 379. And see p. 273, *ante*.

[64] *Present Law of Abuse of Legal Procedure*, p. 218.

[65] See *Fray* v. *Blackburn* (1863) 3 B. & S. 576, and authorities cited p. 272, *ante*.

[66] [1892] A.C. 61.

[67] 'Immunity for Judicial Acts', *S.P.T.L. Journal*, 1924–28, p. 17n.

[68] (1868) L.R. 3 Ex. 220.

[69] (1876) 2 C.P.D. 53.

[70] (1883) 11 Q.B.D. 588.

[71] [1895] 1 Q.B. 668.

Some of the dicta in these cases deserve setting out. In *Scott* v. *Stansfield*[72] Kelly C.B. says: 'It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear'. Lord Esher, in *Anderson* v. *Gorrie*,[73] states: 'To my mind there is no doubt that the proposition is true to its fullest extent, that no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office'. And Kay L.J. in the same case[74]: 'I take the law to be clear that for an act done by a judge in his capacity of judge he cannot be made liable in an action, even though he acted maliciously and for the purpose of gratifying private spleen'.

Any of these statements, not being confined to courts of record, could be taken to cover justices of the peace, and it was held in *Law* v. *Llewellyn*[75] that a justice was a 'judge' within the meaning of those cases and that he could not be sued in respect of a defamatory statement made by him in the course of his judicial duties. There seems no reason to distinguish between actions for slander and other actions founded upon alleged torts committed by a justice in the course of exercising his proper jurisdiction. Moreover, if it be said that a justice is a judge within the meaning of *Anderson* v. *Gorrie*,[76] it must be remembered that Lord Esher referred[77] to acts done as well as words spoken. However, the question is not finally settled by these cases; but if *Law* v. *Llewellyn*[78] be taken (or eventually be decided) to apply to acts done, the Justices' Protection Act, 1848, will be a dead letter with regard to judicial irregularities, however malicious, committed by magistrates in a matter in which they have general jurisdiction.

That does not mean that the Act could be disregarded in such circumstances. So far, attention has been paid only to judicial functions: but justices of the peace have ministerial and administrative functions besides. It may be that the Act was designed to protect ministerial acts by justices, and that a gap in the common law in this connection had to be stopped. It is clear that an action lay at common law against a justice who refused to act in his ministerial capacity.[79] The report of a case in 1664[80] states: 'Le sole remedy in case que justice de peace refuse de prender le serement del party robbed est pur il d'aver action sur le case vers

[72] (1868) L.R. 3 Ex. 220 at p. 223.
[73] [1895] 1 Q.B. 668 at p. 671.
[74] [1895] 1 Q.B. 672.
[75] [1906] 1 K.B. 487. See esp. *per* Romer L.J. at p. 491.
[76] [1895] 1 Q.B. 668.
[77] [1895] 1 Q.B. 671.
[78] [1906] 1 K.B. 487.
[79] Agreed, obiter, by the judges in *Green* v. *Hundred of Buccle-churches* (1589) 1 Leon. 323.
[80] *Anon.*, 1 Siderf. 209.

luy'. It is not laid down as a prerequisite that the justice must be malicious. Hawkins[81] agrees, and though he refers to justices who act corruptly, he does not say that they must act maliciously. Equally, one would suppose, an action lies against a superior judge who refuses to act ministerially: the general proposition laid down in *Ferguson* v. *Earl of Kinnoull*[82]—where a non-malicious refusal to exercise a ministerial function was held actionable—is broad enough to support that supposition. This same liability to action attached to the administrative irregularities of justices at common law.[83]

To decide that the Act of 1848 protected justices from the consequences of irregularities committed in their ministerial or administrative roles would probably be to put them in a more favourable position than their superiors: but there is some authority for saying that this is just what happened. Halsbury[84] advances the proposition that no action lies against a magistrate for an act which is not malicious unless it is ministerial, and the authority given, *Linford* v. *Fitzroy*,[85] which was a case decided on section 1 of the Act, does suggest that an action lies in respect of a wrongful ministerial order, even if not malicious; but this might be considered obiter dictum. Keir and Lawson,[86] after mentioning the Justices' Protection Act, 1848, say: 'In connexion with acts done within their jurisdiction, it should be noted that where a justice of the peace exercises strictly judicial and not administrative or quasi-judicial functions, he is entitled to the same absolute immunity as any other judge of an inferior court', thus indicating that they believe the Act to have affected only the non-judicial irregularities of justices. Support is to be found for this belief in *Hardy* v. *North Riding of Yorkshire Justices*.[87] In this case it was held that as the building of a police station is an act done by justices in the execution of their office, the justices, if sued for negligence in the building or maintaining thereof and for damage arising therefrom, would be entitled to the protection of the 1848 Act. The clearest statement of this view was made by Lord Finlay in *Everett* v. *Griffiths*,[88] where he said: 'Judicial immunity is not confined to judges of the High Court. It extends to all judges. The protection given to justices of the peace by the first section of the statute 11 & 12 Vict. c. 44,[89] is not wanted, and does not apply, in respect of acts of a purely judicial nature relating to matters within the justices' jurisdiction. Its protection

81 3 Hawk.P.C. c. 8, s. 74, cited p. 272, *ante*.
82 (1842) 9 Cl. & F. 251.
83 See Halsbury, *Laws of England*, 1st ed., Vol. 23, p. 325.
84 *Statutes of England*, 2nd ed., Vol. 14, p. 802.
85 (1849) 13 Q.B. 240.
86 *Cases in Constitutional Law*, 3rd ed., p. 129. See also E. C. S. Wade and G. G. Phillips, *Constitutional Law*, 2nd ed., p. 258.
87 (1886) 50 J.P. 663.
88 [1921] A.C. 631 at p. 666.
89 Justices' Protection Act, 1848.

is wanted in respect of acts of a ministerial character, and its provisions have not the effect of rendering justices of the peace liable to be sued in respect of purely judicial acts, even if alleged to be malicious '.

No purpose would be served by summarising here the various possibilities mooted in the preceding pages, for it is impossible to alight upon one and select it for favour. The object of this article is not to demonstrate the true meaning of the Act, but rather to show the existence of rival claims to that status, and the muddle the position is in. The law on this subject is crying out for legislative clarification. In the meantime, one can only say with Platt B. in *Kirby* v. *Simpson*,[90] ' The arrangement of the 11 & 12 Vict. c. 44 is not very perspicuous; and I must say, that I do not well understand it '.

L. A. Sheridan.*

[90] (1854) 10 Ex. 358 at p. 367.

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THE PLACE OF PARLIAMENT IN THE LEGISLATIVE PROCESS

Part I

A. *Introduction.*

There is always a great danger of constitutional theory lagging far behind constitutional practice. In this field of law far more than any other it is common to hear such expressions as 'In theory, that is correct. But what *actually happens* . . .' and what actually happens often seems to be regarded as an upstart with not quite the correct educational background. This attitude can lead to some strange results as when Salmond wrote: 'The *legislative* sovereignty resides in the Crown and the two Houses of Parliament, but the *executive sovereignty* resides in the Crown by itself, the Houses of Parliament having no share in it. It will be understood that we are here dealing exclusively with the law or legal theory of the Constitution. The practice is doubtless different; for in practice the House of Commons has obtained complete control over the executive Government'.[1] One reason for the attitude which leads to this divergence is that today, when Parliamentary democracy is in many parts of the world being superseded or failing to be adopted, we are reluctant to admit in public that it has any shortcomings in its present form. When we compare it with other forms of government, we become Blackstonian in our adulation. We feel that at all costs the theory of the Constitution must be upheld, forgetting that its constant modification over the last seven hundred years has alone saved it from decay and that, indeed, this adaptability is one of its greatest assets. Some writers point to the struggles of the seventeenth century and suggest that present developments are tending to reverse the outcome of those struggles. It may be that the emergence of responsible and representative government in the eighteenth and nineteenth centuries rests on the Revolution of 1688; but it is ludicrous to ignore this emergence and to suggest that political developments in the twentieth century are set against the same backcloth as those of the seventeenth century. The increase in governmental activity in this century is closely linked to the Reform Act of 1832. It is more than ever necessary today to show that Parliamentary democracy is a flexible instrument and to judge its institutions not by theories of the Constitution which were applicable to other circumstances but by the way in which they meet the needs of the day; by a functional not an *a priori* approach. To conclude these commonplaces, it is necessary to remember that the outstanding

[1] *Jurisprudence*, 10th ed., p. 491.

characteristics of the Constitution today are: first, that the Government controls voting of the majority in the House of Commons; second, that most legislation is Government legislation; third, that the House of Commons is very short of time for all the functions it attempts to perform; fourth, that far more legislation is enacted today than in the past. These characteristics are indisputable as statements of fact but opinions differ on their desirability. Thus the party system, which enables the Government to control voting, is sometimes blamed for what is regarded as an unhealthy concentration of power in the Executive; the small amount of time available for private members' Bills is deplored; the over-working of the House of Commons is cited to show that the machine is being driven too fast; and it is argued that too much legislation is today enacted. All these contentions are tenable; agreement or disagreement with them is largely a matter of political opinion. With this we are not concerned. Again, much of the opposition to the practice of delegating legislative power, for example, is based in reality on a dislike of the *content* of statutory instruments. But we are concerned with the fact that this delegation has happened and is inevitable. Whether it should be reduced or increased and whether the safeguards are adequate, are important but, to the present purpose, irrelevant matters. The Constitution has changed under the pressure of events. It would be too large a task to attempt to survey the whole outcome of the change. The examination is here limited to the legislative process applicable to governmental proposals. The nature of this process will be examined and certain deductions drawn and applied.

The foundations of the present relationship of the Executive to Parliament are to be found not so much in the events of the seventeenth century as in those of the middle years of the nineteenth century. Democracy became established in this latter period in the sense of a Constitution under which sovereign power is possessed by the numerical majority of the male citizens.[2] The change from aristocracy was not deliberately engineered; indeed, all parties were allied in its defence until well into the nineteenth century. In 1783, Pitt could say, 'I utterly reject and condemn the mode of election by universal suffrage'.[3] Ten years later, Fox said that 'there was not in the kingdom a more steady and decided enemy to general and universal representation' than himself.[4] In the first thirty years of the nineteenth century it was, says Lowes Dickinson writing in 1895, 'dread of the influence of the sovereign and his ministers that was the main motive swaying the Whigs to reform. . . . That influence was exercised mainly through the medium of

[2] See Dicey, *The Relation between Law and Public Opinion in England during the Nineteenth Century*, 2nd ed., p. 52.

[3] *Speeches*, ed. 1817, Vol. I, p. 47 (quoted by G. Lowes Dickinson in *The Development of Parliament during the Nineteenth Century*, p. 10).

[4] *Speeches*, ed. 1815, Vol. V, p. 97 (quoted by Dickinson, pp. 10–11).

the smaller boroughs'.[5] The Reform Act of 1832 was the actual consequence of this fear but was not intended by the political parties to herald the change from aristocracy to democracy. The great popular feeling in support of the Bill no doubt reflected the desire for this change in a modified form. The modification was that the middle classes fought for what the Bill would give them—some control over taxation; the leaders of the working classes regarded it as a first step.[6] The later reforms in representation were not attended with the same enthusiasm from without; they were rather in the nature of party manœuvres, kept on the move no doubt by the consciously reformist and radical members of the community. Once the principle of 1832 was established, 1867 and 1884 followed almost inevitably. The system of representation before 1832 had enabled the Executive to govern through Parliament by the use of influence and patronage. It was the proposed destruction of this link that caused the Duke of Wellington to ask of the 1832 legislation 'How is the King's government to be carried on if the bill passes?'[7] The Act of 1867 firmly established the democratic form of government. Its significance was not altogether recognised but Lowe regarded the clause which gave householders the franchise as 'probably the most important that was ever submitted to the House of Commons. . . . We have arrived at the point of a complete revolution in our Constitution'.[8] There was, however, very little opposition to the principle of the Bill as both parties had been vying with each other in measures for the reform of representation. By 1867, the subject had become rather stale and Lowe observed also that there was a fear of offending those who were to be enfranchised. As Dickinson points out,[9] Lowe was one of the few who saw the likely effects of this great extension. He made his general attitude very clear, when he said 'You are about to take away the management of affairs from the upper and middle classes, who have managed affairs since the Reform Bill, as I think with some little success, and you are about to place it in the hands of people of whose politics you know nothing, for the best of all possible reasons—because they do not know what their politics are themselves'. But, he added, they will learn politics and their politics will be socialism. 'Once give them power, and the use they will make of it will be to try to remedy evils which no doubt grind them very sorely, and which, I suppose, we should all like to remedy if we could, but which most of us believe to be beyond the reach of legislation'. The results, he added, would be a removal of taxes, a graduated income tax, protection and fixed hours of work.[10]

Alongside this general development, affecting but by no means

[5] Dickinson, pp. 19–20.
[6] *Ib.*, p. 33.
[7] See Holdsworth, *History of English Law*, Vol. X, pp. 629–32.
[8] *Hansard*, Vol. CLXXXVII, cols. 781, 784.
[9] Pp. 64–5.
[10] *Hansard*, *ib.*, cols. 788–9.

causing it, was the growth of the working-class movement. Chartism, trades unionism, collectivism and, later, Fabianism formed a continuous pressure towards a democratic form of government. Moreover, the position of a member of Parliament became less free. The National Union of Conservative and Constitutional Associations was founded in 1867. The National Liberal Federation was founded in 1877. From those dates, party discipline has tightened. Aristocracy, influence and patronage gave way to democracy, party discipline and what may be called, until a new word is coined, protégéism.

The same influences which effected this change in the form of government also affected the general field of legislation. Maitland, writing in 1887–8, in a characteristic and well-known passage, calls the eighteenth century ' the century of privilegia. It seems afraid to rise to the dignity of a general proposition. . . . We may attribute this to jealousy of the crown. . . . As time has gone on parliament has become much less suspicious of the crown, because " the crown " has come to mean a very different thing from what it meant in the last century. The change is a gradual one, but I think we may say that it becomes very apparent soon after the Reform Act of 1832. Parliament begins to *legislate* with remarkable vigour, to overhaul the whole law of the country . . . but about the same time it gives up the attempt to *govern* the country, to say what commons shall be enclosed, what roads shall be widened, what boroughs shall have paid constables and so forth. It begins to lay down general rules about these matters and to entrust their working partly to officials, to secretaries of state, to boards of commissioners, who for this purpose are endowed with new statutory powers, partly to the law courts '.[11] There are really two separate matters involved in this statement which Maitland does not seem to have clearly disentangled. The first is that the eighteenth as compared with the nineteenth century was not a time of extensive administrative reformation. The second is that many of the Acts which Parliament passed were of detailed and local rather than of general and universal application. It seems likely that the reason for the second is to be found in the first rather than in jealousy of the Crown. Large-scale reform does not happen spontaneously; it is the consequence of sustained dissatisfaction which has found expression and a means of remedy. The forces of inaction were very strong in the eighteenth century. It was not so much that Parliament governed rather than legislated but that no one ' governed ' (in the nineteenth and twentieth centuries' use of that term) at all. Redlich, writing of the eighteenth century, says ' There was then no constant stream of reforms on a large scale, there were no bills with hundreds of clauses and countless technical details of a contentious character. Domestic legislation for the whole of the period of parliamentary conservatism was

[11] *The Constitutional History of England*, pp. 383–4.

confined to small alterations in administrative law, to special and local enactments. The centre of gravity of the action of the House of Commons lay in the region of foreign and colonial policy, and the financial measures rendered necessary by the decisions on such subjects. The manifold forms of financial discussion furnished the framework into which the members of the House could insert the motions which arose out of the political situation or party tactics '.[12] What is particularly important is that the Government of the day did not regard itself at that time as the natural initiator of legislation. Until the middle of the nineteenth century the attitude of the Executive varied considerably. At some periods of history, there was a large amount of Government legislation; at others, very little. Dicey wrote that ' From the beginning of the eighteenth century till pretty nearly the time of the Reform Bill, the chief duty of the Ministry was not the passing of laws, but the guidance of national policy. Chatham was the leading statesman of his time and country, but we cannot, it is said, attribute to him a single material amendment of the law '.[13] This is reflected in what Holdsworth calls ' the excessive individuality of the statutes passed by the Legislature ' in the eighteenth century.[14] He writes: ' Though such emergencies as the rebellion of 1745 might lead to important domestic legislation initiated by the government, for the most part the initiation of legislation for the purposes of effecting reforms in the law was left to individual peers or members of the House of Commons '.[15] It follows that Ministries did not feel bound to resign on defeat over a legislative measure and this was so even if it was their own. Anson writes that ' there is no instance before 1830 of a Ministry retiring because it was beaten on a question of legislation, or even of taxation '.[16] The change occurred in those vital years immediately following 1832.

Sir Charles Wood is reported to have said in about 1855 : ' When I was first in Parliament, twenty-seven years ago, the functions of the Government were chiefly executive. Changes in our laws were proposed by independent members, and carried, not as party questions, by their combined action on both sides. Now, when an independent member brings forward a subject it is not to propose himself a measure, but to call to it the attention of the Government. All the House joins in declaring that the present state of the law is abominable and is requiring the Government to provide a remedy. As soon as the Government has obeyed, and prepared one, they all oppose it. Our defects as legislators, which is *not* our business, damage us as administrators, which *is* our business '.[17] In 1901,

12 *Procedure of the House of Commons*, Vol. I, p. 66.
13 *Jurisprudence*, 10th ed., p. 85.
14 *History of English Law*, Vol. XI, p. 376.
15 *Ib.*, p. 371.
16 Quoted by Holdsworth, *ib.*, p. 380. Compare Dicey, p. 85.
17 Quoted in C. P. Ilbert, *Legislative Methods and Forms*, pp. 82–3. Sir Charles Wood is speaking as a member of the Administration, not as a member of Parliament.

Ilbert wrote, 'It is almost impossible to emphasise too strongly the enormous change which the Reform Act of 1832 introduced into the character of English legislation, or the complete contrast between the legislation which preceded and the legislation which followed that date'.[18] It is possible that too much emphasis is placed on the effect of the 1832 Act. It seems more likely that the complex of events which produced that Act and the popular support for it also effected the change in the nature of legislation and in the relationship between Executive and Parliament. All these are probably consequences of more fundamental changes in the structure of society which were taking place at that time. Ilbert himself compiles a formidable list of which 'the shifting of the centre of political gravity' after the 1832 Act is only one item. The others include scientific discovery, commercial enterprise and industrial activity, concentrations of population in town and factory, and the growth of movements designed to improve the welfare of the working classes.[19] It is impossible to distinguish cause and effect in this variety of developments but we may guess that the political changes resulted from the economic changes. Looking back from the middle of the twentieth century it is easy (perhaps too easy) to see in the events of the year immediately following 1832 the beginnings of that movement which led from the negative to the positive state, to see the end of laissez-faire and the birth of socialism as a political and economic force. Writing in 1901 Ilbert says, 'The Parliament of the present day has largely reverted *in substance* to the practice of the Parliament of the first Edwards, under which the king, by his Ministers, made the laws'.[20] But the Government had accepted the responsibility for a legislative programme thirty or forty years before this. Today the King's Speech is expected to give a fair indication of the legislative proposals which the Government intends to pass through Parliament. The form of the Speech [21] has changed little but its content has changed considerably. If we go back to the eighteenth century, we find in 1770 a suggestion that there might be a measure to control the outbreak of distemper among horned cattle. This suggestion indeed came in for ridicule since it had been hoped mention might be made of the question of the hour—the Middlesex elections. The Speech concluded with 'the usual recommendation to unanimity'—'I am sensible how little I need say to you, at this time, to prevail upon you to unite in whatever may best promote the true interest of your country. In all your deliberations upon points of a domestic nature, let the extension of our commerce, the improvement of the revenue and the maintenance of order and good government, be always in your view'. In 1800 the Speech referred to the high price of grain and indicated the need for measures. Several Acts of limited application resulted.

[18] *Ib.*, p. 211. [19] *Ib.*, p. 212. [20] *Ib.*, p. 213.
[21] The quotations which follow are taken from the Annual Registers.

One forbade the selling of bread until twenty-four hours after baking [22]; another prohibited the use of wheat in making starch [23]; others granted increased bounties on imported wheat and oats.[24] The 1810 Speech expressed the hope that Parliament would resume the consideration of the state of the inferior clergy, and 'adopt such further measures upon this interesting subject' as might appear proper. The 1820s show the beginning of the change. In 1822, the depressed state of the agricultural interest was noted—'the condition of an interest so essentially connected with the prosperity of the country will, of course, attract your early attention'. In 1824, attention is drawn to measures 'for promoting the moral improvement of the negroes'. The unrest in Ireland, of course, constantly recurs and in 1825 His Majesty relied, he said, upon the wisdom of Parliament 'to consider, without delay, the means of applying a remedy to this evil'. Similar words were applied for dealing with the slump and unemployment in the Speech of 1826. The words of the 1826 Speech emphasise the change: 'His Majesty commands us to acquaint you, that his attention has been of late earnestly directed to various important considerations connected with improvements in the general administration of the law. His Majesty has directed that measures shall be submitted to you for your deliberation, of which some are calculated, in the opinion of His Majesty, to facilitate and expedite the course of justice in different parts of the United Kingdom; and others which appear to be necessary preliminaries to a revision of the practice and proceedings of the Superior Courts'. The Speeches of the 1830s contained the outline of more and more measures; that of 1834 referred to the previous session as one 'in which more numerous and more important questions were brought under the consideration of Parliament than during any former period of similar duration'. Municipal corporations, the poor law, tithes in England, Wales and Ireland, local rates, civil jurisprudence and Ecclesiastical law and discipline, marriage rites, the Church in Scotland, and many other matters occupied the attention of Parliament in this decade and were referred to in the King's Speeches. It is no doubt possible to regard this small piece of evidence as too significant. The change in form does not necessarily reflect a change in substance but it confirms the impression of Sir Charles Wood mentioned above that in the years between 1828 and 1855, the Government began to assume responsibility for a considerable part of the legislative programme of Parliament.

There is yet another pointer to this period. Ilbert regarded the increased complexity of legislation since 1832 as the most important cause of the assumption by the Government of the responsibility for legislation.[25] Government departments could employ draftsmen; they therefore gained the initiative. But it is at least as

[22] 39 & 40 Geo. 3, c. 18.
[23] 39 & 40 Geo. 3, c. 25.
[24] 39 & 40 Geo. 3, cc. 35, 53.
[25] *Op. cit.* p. 216.

likely that departments employed draftsmen because they had this legislative work thrust upon them. The history of the matter suggests that this is the truer interpretation. The younger Pitt employed draftsmen at the end of the eighteenth century for certain matters and in 1833 Mr. William Harrison told a Select Committee of the House of Commons that he had the duty of drawing or settling all the Bills belonging to the Government in the Department of the Treasury and that he also drew Bills for other departments. As Ilbert says, his evidence is 'of interest as illustrating the dawn of the sense of the Government responsibility for Parliamentary legislation'.[26] In 1837, the Home Office appointed a draftsman for Government legislation; in 1848 his successor prepared Bills for all departments. Finally the Parliamentary Counsel's Office was established in 1869.

B. *The Legislative Process Today*

The legislative process embraces the whole train of events which take place from the conceiving of a measure to its final enactment by the King in Parliament. A proposal for legislation springs from some real or supposed defect in the existing statutory or common law or in the administration of the State. While this description covers all forms of legislation we are here concerned solely with those proposals which become public Bills put forward on behalf of the Government. Sir Ivor Jennings has attempted at some length to answer his own question 'Who Makes the Laws?'[27] The original suggestion may come from one of a number of sources. It may be a part of declared Government policy; it may be departmental policy; it may be advanced by a group to which the Government is linked and on whom it depends for support; it may be the result of a Royal Commission or of an *ad hoc* committee. Whatever its source, discussion on the general principles which lie behind it are likely to have been debated at considerable length before the first clause is drafted. If it is a matter of governmental policy, the idea has probably been thrashed out by every type of important and unimportant member of the political party for many years; it will have been the subject of articles and papers, of conferences and public meetings. The proposal may well take the form of an amending Bill; if so, the practical shortcomings of its predecessor will form the basis of examination. Almost certainly some organisation will, for some time, have been pressing on the department concerned the urgency and desirability of the measure. A department which decides to press for legislation on a particular subject must persuade the Cabinet that it is desirable. Having done so, the department must obtain a place in the legislative programme of the Cabinet. Later, the Cabinet will examine the final draft of the Bill and further alterations may be made. For all these purposes

[26] *Ib.*, p. 82.
[27] *Parliament*, Chap. VII.

the Cabinet normally operates through committees under the chairmanship of the Lord President of the Council. The composition of these committees varies according to the subject-matter of the Bill (as to which departments other than the sponsoring department will attend) and according to the stage which the negotiations have reached (thus the Chief Whip will always be present when the legislative programme is being discussed and the draftsman will be present when an actual draft is under consideration). These negotiations will start many months before the beginning of the session in which, it is hoped, the Bill will be introduced. They may continue into that session especially where the Bill has a relatively low place in the order for introduction.

The drafting of the Bill commences after policy approval and a place in the legislative programme have been obtained. The division of the department will normally give full details to the legal officers of the department who will then instruct Parliamentary Counsel. The next stage does not seem to have altered since Ilbert wrote in 1901 'The first crude sketch will be gradually elaborated. There will be daily conferences with the Minister or with the permanent head of the department, or with both. There will be interviews and correspondence with experts in various branches of the subject with which the measure deals. Notes will have to be written tracing the history of previous legislation or attempts at legislation, and explaining the reasons for and effect of the several proposals embodied in the draft Bill, and stating the arguments which may be advanced for and against them, and these will soon grow into a formidable literature of commentaries'.[28] Nor will consultation and discussion be confined to those employed in an official or advisory capacity by the department. The opinions, arguments and view-points of those who are to be directly affected by the measure will no doubt have already been made known to the department. And now, while the Bill is being drafted these affected persons are likely to be drawn into consultation once more. Probably the amount of detailed information on the nature of the departmental proposal which is given to such persons is not great; but particular points are raised and reactions ascertained. The more matters of dispute which can be settled outside Parliament the better for the department and the more speedy the passage of those parts of the Bill particularly in Committee.

'Those who are familiar with Parliamentary procedure', writes Ilbert, 'are well aware of the difficulties with which the promoter of any important measure has necessarily to contend. The measure may have gone through a long period of gestation before its introduction to Parliament. Information and opinions on different points will have been confidentially obtained from various quarters; the provisions of the measure will have assumed many varying forms; and the alternatives will have been carefully discussed and

[28] *Op. cit.* p. 228.

compared. Yet, in spite of all these precautions, as soon as the measure has been printed and circulated, swarms of amendments will begin to settle down on the notice paper, like clouds of mosquitoes'.[29] The procedure in Parliament which follows is so well-known that no detailed comment is called for. It is worth noting, however, that the opposition to the Bill in Parliament both in principle and on points of detail is to a large extent inspired by those sections of the community who, as affected interests, will already have had some opportunity of making their opinions known. Discussion and consideration at Westminster are not confined to the recognised stages of a Bill. Often the informal meetings are more important. These are of two kinds : those which take place within each Parliamentary party and those which take place between the parties. Of the first kind, are the regular meetings of the leaders of the parties with their Parliamentary members in the House of Commons. In these private meetings, matters of policy and detail are discussed at length and amendments to be urged (in the case of the Opposition) or made (in the case of the Government) are agreed. This is part of the planning stage for the Parliamentary battle and gives an opportunity for the opinions of back-benchers to be heard once again. The second kind comprises all the negotiations on a Bill which take place 'through the usual channels' or 'behind the Speaker's chair'. In the House of Lords in particular, informal negotiations between parties may involve discussion on the merits of different parts of the Bill. Short of this, the negotiations will do much to settle the course of the battle in the Chamber and in Committee. The whole of the Bill may not be discussed in detail due to the shortage of time and the use of the kangaroo and the guillotine procedures. But eventually, on receiving the threefold assent, the Bill becomes law.

The process through which subordinate legislation passes is both like and unlike the process just described. It draws its authority and inspiration from its parent Act. It will be drafted within the department and not by Parliamentary Counsel. Some departments have an Orders Committee for co-ordinating the preparation of subordinate legislation and reviewing existing instruments. Memoranda are submitted to this Committee stating the effect of the proposed order, its purpose, the views of affected interests, the opinions of other interested departments and similar matters. Matters of dispute arising between the proposing Division and this Committee may have to be decided by some higher officer within the department. The final drafting or at least the approval of the final draft seems normally to be subject to the approval of this Committee. The consultation with affected interests takes place in much the same way as it does for Bills and in particular there appears to be the same reluctance to divulge the actual words of

[29] *Ib.*, p. 230.

any draft. At the same time this consultation is an essential part in the preparation of any subordinate legislation of importance and was emphasised in the evidence given before the Committee on Ministers' Powers.[30] This is a matter of practice, not of statutory requirement. In addition, in certain cases, special procedures are required by statute to be followed before the rule, order, regulation or scheme can be made. We have elsewhere described some of these requirements and have noted the particular importance of the National Insurance Advisory Committee.[31] Again, charges schemes made under the Transport Act, 1947,[32] are prepared by the British Transport Commission and submitted to the Transport Tribunal for confirmation. Here the process of legislation (for it is nothing else) is initiated and concluded by bodies independent of Parliament and the Executive alike. The Tribunal is required to hear representations and objections. In the transitional period before the schemes are first submitted (and the Minister of Transport has already extended the period to August 1951), the Minister may by regulations authorise the Commission to increase its charges; before so doing the Minister is obliged to consult with, and consider the advice of, the permanent members of the Tribunal. Such consultation has recently taken place[33] and the Tribunal, although under no statutory obligation to do so, invited representative bodies of traders and shipping, on the suggestion of the Minister, to give their views. The lengthy proceedings had all the trappings of a legal inquiry. Learned counsel appeared for both the Transport Commission and the affected interests. The chief witnesses for the Commission, who put the case for the increase, were subjected to severe cross-examination during which the activities of the Commission were closely examined and other methods of enabling the transport undertakings to balance their accounts suggested and investigated. The Monopolies and Restrictive Practices Commission, set up under the Act of 1948,[34] performs a somewhat similar function where matters are referred to it by the Board of Trade for investigation and report. The Commission has 'power to determine the extent, if any, to which persons interested or claiming to be interested in the subject-matter of the reference are allowed to be present or to be heard, either by themselves or by their representatives, or to cross-examine witnesses or otherwise take part in the investigation of the Commission'. Where the interest is substantial, the representations must be considered and will normally be heard orally. A resulting order may be made by the Board of Trade, one of six named Ministers, the Admiralty or the Secretary of State. For many orders and

30 *Minutes, e.g.*, pp. 5 (21), 35–6 (4), 120 (3), 121–2 (7), paras. 1810, 3309.
31 'Delegated Legislation—Some Recent Developments' (*Modern Law Review*, July, 1949, p. 297).
32 10 & 11 Geo. 6, c. 49, ss. 76–82.
33 Ministry of Transport Nos. 55–221–1–50 to 55–221–11–50.
34 11 & 12 Geo. 6, c. 66.

schemes, local inquiries are required and this form of procedure has reached its most advanced stage when linked with special Parliamentary procedure in those orders which are subject to the Statutory Orders (Special Procedure) Act, 1945.[35]

The legislative process for most forms of delegated legislation includes the laying before Parliament followed by the negative or affirmative procedures. Many forms of subordinate legislation pass under the scrutiny of the Select Committee on Statutory Instruments of the House of Commons.[36]

To summarise : the forty years that lie between 1830 and 1870 saw the establishment of numerical democracy at the expense of the aristocratic form of government, the beginnings of the modern forms of party discipline, the laying down of general rules of administrative law and the establishment of new institutions, the acceptance by the Government of the responsibility for a legislative programme and the development of a technique for dealing with that responsibility. The nature and content of legislation has, since the middle of the nineteenth century, become increasingly complex. The problems to be dealt with have become more numerous and the time which Parliament can devote to the consideration of each proposal correspondingly more restricted. The legislative process for Bills today is long and involved. Departmental consideration of questions which have often been widely discussed over many years, examination by Cabinet committees, consultation with affected interests and with experts, all lead to technical drafting and reconsideration before the proposal is examined by the representative body. Subordinate legislation is subjected to similar examination by departments and often by affected interests; statutes sometimes require consultation by specified bodies; Parliamentary examination does not follow as a matter of course and generally does not follow at all though a large number of instruments are considered, after they have been made, by the Select Committee set up for that purpose.

There are, therefore, three principal groups involved in the legislative process: Government departments, the affected interests and Parliament. Each to a greater or lesser extent plays a part in the process. The remainder of this article examines what part is played and ought to be played by Parliament.

C. *The Parliamentary Function.*

Some of the confusion that surrounds this question is due to an ambiguity in the meaning of the phrase 'to legislate' or 'to make laws'. When Parliament is called the Legislature what is meant is that no body or person can issue an order, rule, regulation, scheme or enactment having the force of law without Parliamentary

[35] 9 & 10 Geo. 6, c. 18.
[36] See article referred to in note 31.

authority.[37] But it does not follow that Parliament is responsible for the whole of the legislative process or that an enactment which Parliament has not specifically examined is invalid. In other words, 'to legislate' may mean either to authorise the action which turns a legislative proposal into a law or to carry through the whole legislative process. In this latter sense, legislation today is more a Governmental than a Parliamentary function. Parliament has its part to play in this process but the extent to which this part should be played and the nature of the part to be played must be determined by reference to the characteristics and capabilities of the Parliamentary body. John Stuart Mill put it in these words: 'While it is essential to representative government that the practical supremacy in the State should reside in the representatives of the people, it is an open question what actual functions, what precise part in the machinery of government, shall be directly and personally discharged by the representative body. . . . It is one question, therefore, what a popular assembly should control, another what it should itself do. It should . . . control all the operations of government. But in order to determine through what channels this general control may most expediently be exercised, and what portions of the business of government the representative assembly should hold in its own hands, it is necessary to consider what kinds of business a numerous body is competent to perform properly. That alone which it can do well, it ought to take personally upon itself. With regard to the rest, its proper province is not to do it, but to take means for having it well done by others'.[38] He goes on to show that a representative assembly cannot administer. As the scope of government has increased through the twentieth century, Parliament, through its failure to adapt itself, has found even this general control slipping from its grasp. Proposals for reform have gone to the other extreme and have urged that Parliament should be more implicated in the process of administration. The suggestion that committees of members should specialise in the work of particular departments leads to this result; it has been argued that such committees should have power to call before them departmental officials and that there should be a continuous check by members on the detailed expenditure of departments, to fill the 'gap' between the period covered by the Select Committee on Estimates and that covered by the Public Accounts Committee. It may be that the machinery for transmitting information to members is inadequate and that departments should be freer with their 'secrets', so that criticism can be more constructive and based on most of the facts. But there is a very great danger in any attempt by Parliament to extend its operations into the sphere of administration. No Minister should be able to

[37] The remaining prerogative power to legislate is an exception. So, perhaps, is the power inherent in a corporation.

[38] *Considerations on Representative Government*, Chap. V.

hide his failures by pleading the instructions of his critics. 'Whenever Parliament is persuaded to assume the offices of executive government, it will lose all the confidence, love and veneration, which it has ever enjoyed whilst it was supposed the *corrective and control* of the acting powers of the State. This would be the event, though its conduct in such a perversion of its functions should be tolerably just and moderate; but if it should be iniquitous, violent, full of passion, and full of faction, it would be considered as the most intolerable of all the modes of tyranny'. So wrote Burke.[39]

All this is apposite today in the field of legislation. We have argued that legislation is largely a governmental function, but that Parliament plays an important part in the process. It is the duty of Parliament to examine, criticise and approve those parts of a legislative proposal which by its nature and composition it is fitted to examine, criticise and approve. We expand this contention below but must first deal with the opposition to this idea of the Parliamentary function. This opposition is most clearly expressed in the discussion over delegated legislation for this is the field in which Parliament has least control. Naturally and properly it has been in Parliament itself that much of this opposition has been expressed. Dr. Chih-Mai Chen has made a valuable study of Parliamentary criticisms of delegated legislation.[40] He quotes [41] Sir John Marriott as saying in 1929: 'The position in which we find ourselves amounts to nothing less than an abdication on the part of Parliament of its supreme legislative function . . . it was the traditional method of English legislation to provide by Statute, as far as possible, beforehand for every contingency which could be expected to arise. . . . The danger we have to face at present is in the wholesale delegation to the administrative departments of legislative or quasi-legislative powers, which ought to be exercised only in Parliament itself or, to put it at the lowest, under the closer scrutiny and supervision of Parliament'.[42] In the debate on the Local Government Act, 1929, Sir John said 'Not once but over and over again in recent legislation this House has parted with powers which indisputably belong to Parliament alone. Legislation is one thing and administration is another'.[43] This statement (which is an example of the pronouncements of a large number of persons) derives, it is suggested, from a traditional but mistaken view of the functions of Parliament in the Constitution today. It may have been true in the eighteenth century that legislation was initiated and largely monopolised by Parliament. It ceased to be true by the middle of the nineteenth century when the whole conception of the function of government was changing. Institutions must adapt themselves to changing conceptions or largely lose their influence.

[39] *Thoughts on the Cause of the Present Discontents* (Macmillan, 1927), p. 52.
[40] *Parliamentary Opinion of Delegated Legislation.* [41] Pp. 70–1.
[42] 226 H.C.Deb., 5s., cols. 2507 *et seq.*
[43] 225 H.C.Deb., 5s., col. 594.

Legislation and administration are not so easily separable as Sir John suggests. There is a very great difference between the Constitutions of the United Kingdom and of the United States. In this country, administration is entirely and legislation is to a large extent part of the duties of the Government. Sir John Marriott's views are sometimes presented in a somewhat different way by calling the practice of delegated legislation 'unconstitutional'. Dr. Chih-Mai Chen quotes[44] Lord Wynford speaking on the Poor Law Amendment Act of 1834: 'Blackstone . . . thought it was unconstitutional that His Majesty should have power of making laws, deciding upon laws, and rescinding laws; and yet the power which Blackstone thought unfit to be placed in the hands of even the King was to be given to these Commissioners'.[45] Theoretically, there is nothing in this contention. The powers to which Parliament assents in a statute can never be unconstitutional. But there is a better answer. Maitland is quoted above as saying that about 1832, Parliament ceased to govern and started to legislate, to lay down general rules and to entrust their working to various administrative bodies. He quotes this Act of 1834 as his first example. The more general the rules contained in a statute the more their detailed application has to be entrusted to others. This detailed application must involve the issuing of instructions. If these instructions are called administrative, no one is much concerned; but if they are called legislative, there is an immediate uproar. Delegated legislation is a natural consequence of the increase of governmental power; it springs from the fact that detailed administrative rules cannot all be contained within the principal legislative proposal. Sometimes matters are left for departmental regulation which ought to have been inserted in the Bill. Sometimes the Bill contains details which might well have been omitted. This is exemplified below. But the fact remains that it is the change in the nature and scope of legislation which make delegated legislation inevitable. Sometimes the doctrine of the Separation of Powers or of checks and balances is invoked. But Ministers are answerable to Parliament and the Government must seek re-election at the end of its term of office. The Government is elected to govern, not to compromise with the Opposition. It is influenced throughout its term by its own Members and also by criticism from the other side of the House when it feels that that criticism reflects a strong body of opinion in the country. But in the final analysis there is no real conflict, during the currency of an Administration, between the Government and the House of Commons. The Government exists because of its majority and its duty is to administer the affairs of the country. It is better that it should do so in accordance with its expressed policy and be ready to accept the consequences than to attempt perpetually to find a

[44] P. 71.
[45] 25 Hansard, 3s., cols. 260–1.

course which will be acceptable to all and which will end by being acceptable to none. Strong administration, influenced by criticism, and ultimately judged by the electorate is the only effective method of carrying on the affairs of the modern democratic State. The same argument answers the contention that delegated legislation infringes the sovereignty of Parliament. Parliament is sovereign in the sense that no other body may legislate save on Parliamentary authority, that anything may be legislated by Parliament or within the terms of its authorisation and that no Government can exist without a majority in the House of Commons. But within these limits, the Government may govern and its right to govern is not affected by Parliamentary sovereignty. Finally, it is said that delegated legislation leads to bureaucracy. If we take this word to mean government by persons who are not responsible to a representative body, then on the surface the contention is not justified as Ministers are responsible to Parliament for their departments. But the more serious charge is a variant : that the representative body has not *enough* control or opportunity for criticism. This is the heart of the matter. Parliament, as it at present conducts its business, touches only certain parts of the work of the Government. It has not time to do more. Some of the fault for this lies with Parliament and with successive Governments; there has been a failure to adapt the representative institution to the changed concept of the purpose and extent of governmental activity. But even if changes were made, Parliament would still be unable to cover the whole field of this activity. New developments, perhaps new institutions, are needed to effect this increased activity. More scope for criticism and for examination of governmental action has to be found.

Legislation initiated by the Government is either drafted in the form of a Bill or, where statutory authority permits, in the form of subordinate legislation. To the Member of Parliament the difference is that he examines the former before it becomes law, but not usually the latter. Where a Bill is being drafted, the decision has constantly to be made whether a particular part is to be inserted in the Bill or left for departmental regulation under a power to be granted by the Bill. Again, the distinction is all-important to the interested member. The Parliamentary function is examination, criticism and approval. The question then is: what parts of the proposal should Parliament examine, or what should be put in the Bill?

The purpose of Parliament, which lies behind its more apparent functions, is to insist on efficient government in the interests of the people along the lines which they have broadly approved at the general election. This is a purpose which a large representative body is fitted to fulfil. The effect of the system of Parliamentary election is to bring together from all parts of the country individuals of many professions and trades, of differing educational and cultural standards, with contrary likes and dislikes. No single member can

represent more than a few of the attributes of his electors. Nor is he chosen to do so. A mining area may return a miner or an agricultural area a farmer but this form of representation is exceptional.

Candidates are adopted by the political organisations of constituencies more on their *general* attainments, *general* appearance and *general* popular appeal than for any particular ability. The immediate question to be considered when choosing a candidate is not even 'Will he make a good member?' but 'Will he win at the election?' It has long been recognised that a Member of Parliament is an individual chosen to perform a particular task. He is not expected to refer back to his electors; he is not their delegate; he is a representative only in the widest sense.

Both the strength and weakness of Parliament lie in the heterogeneity of its membership. The strength arises from its wide and general knowledge, its ability to reflect much of what many of its electors are feeling and to examine the proposals and actions of the Government against the background of the state of the nation. The House of Commons is inevitably split into two separate bodies of opinion: those who favour the general approach of the Government to the issues of the day and those who do not. But both bodies deal with the questions under debate in broad terms, based on general experience rather than specific knowledge. The weakness of Parliament is finally only that it cannot perform two contradictory functions at once. It cannot have both a wide general knowledge and a narrow specific knowledge. No doubt those members who speak will, because of their own research or because they have been briefed, know a great deal about the topic under discussion. But it remains true that on any particular subject the knowledge of the vast majority of members cannot be detailed.

Parliament does not attempt to review every administrative action taken by the Government. Both where the power to act springs from the prerogative and where it is authorised by statute, Parliament by question and debate only touches a very small part of governmental activity. In the legislative sphere, the method is different. Instead of examining in minute detail the precise implications of a few legislative proposals, Parliament purports to examine the broad principles of all. As we shall see, it often happens that in fact some of these principles do not appear before Parliament in the Bill at all, while at the same time a Bill may be loaded with detail which is not or cannot be adequately considered. There are, however, principally three parts to a legislative proposal. The first is the policy—what the proposal is trying to effect. The second is the machinery or plan for the realisation of this policy. The third part contains the rules governing the actual running of this machinery. These divisions are undoubtedly imprecise and often it is difficult to separate the second from the third, but they are broadly applicable to most extensive modern legislative proposals.

It is clearly an important function of the representative body to consider not only the policy (which is often not expressed)[46] but also the plan. The Cabinet and Parliament are indeed the only two bodies, dealing with a Bill, which are in a position to consider these matters against the general background of the needs and desires of the nation. Government departments naturally and rightly are concerned only with a small part of the whole; they are specialised and are concerned to improve and further their own section of the administration. The Cabinet, on the basis of its general policy and in accordance with the financial assets at its disposal, considers the legislative proposals which emanate from the departments. Parliament, also, is able to consider a legislative proposal as a formulation of policy, as a plan for implementing that policy, and in relation to the state of the nation. Sometimes, where the delegated power to legislate is very wide, the plan itself may be excluded from Parliamentary consideration. Modern examples are the Emergency Powers (Defence) Act, 1939,[47] and the Supplies and Services (Extended Purposes) Act, 1947.[48] Under the latter Act, power was given to make regulations 'generally for ensuring that the whole resources of the community are available for use, and are used, in a manner best calculated to serve the interests of the community'.[49] Whether or not such delegation is justifiable in the circumstances of a particular emergency is a matter for political debate. By withdrawing from Parliamentary consideration all matters save the need for power, such a Bill clearly does not permit the representative body to function fully in the way for which it is fitted. In 1877, Lord Thring stated this principle with clarity. 'The province of Parliament', he wrote, 'is to decide material questions affecting the public interest and the more procedure and subordinate matters can be withdrawn from their cognisance, the greater will be the time afforded for a consideration of the more serious questions involved in legislation.' Procedure and matters of detail 'should either be enacted in the Schedule or what is far better (where possible) be left to be prescribed by a court or department of the Government'.[50] This statement of the principle, however, only poses the problem in a different form. What is merely procedural, or a matter of detail? What questions are material or serious?

J. A. G. Griffith.*

(To be concluded)

[46] It may be expressed in a White Paper or some other form.
[47] 2 & 3 Geo. 6, c. 62.
[48] 10 & 11 Geo. 6, c. 55.
[49] Section 1 (1) (*c*).
[50] *Practical Legislation*, Chap. II.

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COMPULSION, COERCION AND CRIMINAL RESPONSIBILITY

JUDGED by the absence of any satisfactory modern authority, it must be very rare for the accused to set up as a defence that he committed the alleged crime under the compulsion of another person. Indeed the whole field of learning on this defence to criminal liability is both meagre and unsatisfactory. Writing in 1883, Sir Fitzjames Stephen declared [1] that 'in the course of nearly thirty years' experience at the bar and on the bench, during which I have paid special attention to the administration of criminal law, I never knew or heard of the defence of compulsion being made except in the case of married women, and I have not been able to find more than two reported cases [2] which bear upon it'. More than half a century later we find the present Lord Chief Justice commenting, in a somewhat similar strain [3]: 'There is very little learning to be found in any of the books or cases on the subject of duress and it is by no means certain how far the doctrine extends'.

The question we have to consider is, to what extent unavoidable compulsion prevents the accused's will going along with his act, thus depriving his conduct of its criminality. It would, perhaps, be as well before proceeding any further to try to reconcile the different expressions used in this connection, namely, compulsion, duress and coercion. It seems generally agreed that duress and compulsion are legally synonymous, but coercion is used only in the particular case of a married woman,[4] importing something less stringent than threats of physical injury necessary to establish the defence of compulsion. Indeed, it may be asked whether this discrimination of terms is really necessary, but so long as the Legislature maintains the position whereby a wife, charged with a criminal offence, is given a wider form of protection than is available to the ordinary member of the community, it remains incumbent upon us to consider this distinction.

Duress may take different forms and arise out of varying relationships. It may be such as to render the accused's act involuntary as, for example, where A is driving a car with all possible care and B, sitting beside A, suddenly and against A's will lunges against A and causes him to run over and kill C, a pedestrian. In such circumstances A is under no criminal liability, but we are here concerned with the far wider application of compulsion

1 *History of the Criminal Law*, Vol. II, p. 106.
2 *R.* v. *McGrowther* (1746), 18 St.Tr. 391, and *R.* v. *Crutchley* (1831) 5 C. & P. 133.
3 *R.* v. *Steane* [1947] 1 K.B. 997 at p. 1005.
4 See Criminal Justice Act, 1925, s. 47.

as a defence. To determine its validity it will be necessary to examine each contingency in turn and it is proposed to consider the position under two main headings:

(1) Where no special relationship exists;
(2) Where a special relationship exists.

Where No Special Relationship Exists

Under this heading is envisaged the case where A is compelled by B alone, or B and others, to commit a criminal act, there being no prior legal relationship between the parties. Several questions arise, such as, does the defence of compulsion extend to all crimes? Does it involve proof of actual violence or is a threat of violence sufficient? Is it violence to the person or to property which is the criterion? To some of these questions a categorical answer can be given, to others it must be admitted that the answers lack any degree of certainty.

Offences to which Duress is a Defence.

The first question for our consideration is, to what crimes may the plea of compulsion be raised? Lord Goddard, in the course of his judgment in *R.* v. *Steane* before the Court of Criminal Appeal, stated[5]: 'We have the authority both of Hale and of Fitzjames Stephen, that, while it does not apply to treason, murder and some other felonies, it does apply to misdemeanours'. Unfortunately, the learned Chief Justice did not give any specific references as the source for his opinion, and it is respectfully suggested that, at any rate in relation to the crime of treason, his view of the authorities is somewhat misleading.

In his *Pleas of the Crown*, Hale emphasises that, in regard to the defence of compulsion, there is to be observed a difference between (i) times of war or public insurrection and rebellion, and (ii) times of peace.[6] As to times of peace, he says[7]: 'If a man be menaced with death unless he will commit an act of treason, murder or robbery, the fear of death will not excuse him if he commit the act. . .'.

With this view of the law Stephen agrees,[8] principally on the grounds of expediency, though he does not hesitate to expose the weakness of Hale's reasoning. The latter suggests that the reason

[5] *Loc. cit.*

[6] 1 *Pl. of the Cr.*, Chap. VIII, p. 49. See, too, Blackstone, *Commentaries*, Vol. IV, p. 30. One must not overlook the possibility that Hale, in drawing this distinction, was influenced by the memory of the civil war and particularly by the famous statute of 1494 (11 Hen. 7, c. 1) which enacted that faithful service to a King *de facto* should not render the person doing such service liable to the penalties of treason, on the restoration of the King *de jure*. Though passed to meet the political needs of the moment it still forms part of our present law. See Stephen, *History of the Criminal Law*, Vol. II, pp. 254–5; Holdsworth, *History of English Law*, Vol. IV, p. 500; and Maitland, *Constitutional History*, p. 229.

[7] *Loc. cit.*

[8] *Op. cit.* p. 107.

for this stringency, in excluding the defence of compulsion, lies in the alternative remedy available to a person menaced with death, namely, applying to the courts for a writ *de securitate pacis*. The fallacy of this argument is only too apparent for, as Stephen points out, there would in all probability be no time or opportunity to resort to the protection of the law.

But in times of war or public insurrection and rebellion, according to Hale, no such absolute rule exists. In such conditions, he says,[9] 'when a person is under so great a power that he cannot resist or avoid, the law in some cases allows an impunity for parties compelled, or drawn by fear of death, to do some acts in themselves capital, which admit no excuse in time of peace'. The only authority cited in support is *Oldcastle's Case*,[10] in which the accused were charged with supplying victuals to Sir John Oldcastle and his accomplices who were in rebellion. They were acquitted by the court because it was found that their acts were done *pro timore mortis et quod recesserunt quam cito potuerunt*. Later on in his work,[11] Hale poses the question whether the same result would be reached if the accused had marched with the rebels for fear of death.

Exactly thirty years later,[12] in 1746, these very circumstances came before the court[13] in the famous case of *R.* v. *McGrowther*[14] in which, although on the facts the plea of duress was rejected by the jury, the court indicated the validity of compulsion as a defence to treason in time of public rebellion. In his summing-up, Lee L.C.J. referred with approval to the rule laid down in *Oldcastle's Case*, as being the test for determining whether the defence of compulsion was maintainable.

Hale, it would appear, excludes only treason, murder and robbery from the application of duress in times of peace, and Stephen does not deviate from this statement of the law. However, as we have seen, in *R.* v. *Steane* the Court of Criminal Appeal, whilst agreeing with the exclusion of treason and murder, went further and introduced the indeterminate phrase 'some other felonies', without attempting to enumerate which felonies were

[9] *Loc. cit.*

[10] Discussing this case in the course of his judgment in *R.* v. *Tolson* (1889) 23 Q.B.D. 168 at p. 186, Stephen J. criticises the explanation given by Coke (3rd Inst. i, 10) as to the basis of the decision. Coke explains the acquittal of Oldcastle's associates by citing the maxim '*Actus non facit reum nisi mens sit rea*'. Stephen J. points out that this is only Coke's own remark and does not form part of the judgment. Furthermore, despite this explanation, Coke, in the margin of his remarks on opinions delivered in Parliament by Thyrning and others in 21 R. 2, says (3rd Inst. i, 22–23), '*Melius est omnia mala pati quam malo consentire*'. As Stephen J. indicates, this would show that Sir John Oldcastle and his accomplices *had* a mens rea, or guilty mind, although they were threatened with death, and thus contradicts the passage first quoted.

[11] *Op. cit.* p. 139.

[12] The first edition of Hale's *Pleas of the Crown* appeared in 1716.

[13] Consisting of Lee C.J., Willes C.J., Wright and Foster JJ., Reynolds and Clive BB.

[14] 18 St.Tr. 391, and Foster, *Reports*, p. 13.

excluded. Perhaps they had in mind the Draft Criminal Code of 1879, Article 23 of which the Royal Commissioners said [15] expressed what they thought was the existing law, and what at all events they suggested ought to be the law. It made compulsion available as a defence in the case of any offence other than high treason, murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson. To the best of my knowledge no adverse judicial comment exists upon this statement.[16] In Canada it is interesting to note that section 20 of the Canadian Criminal Code of 1927 [17] embodies the recommendations of the English Commissioners relating to compulsion, in the exact terms of Article 23 of the Draft Code. On the other hand, examination of the prevailing American law [18] indicates that no provision is made, at any rate where no special relationship exists, for excluding even the most heinous offences, such as murder, or robbery, from the operation of duress as a defence. However, as we shall see presently, the conditions under which compulsion may be successfully raised in the American courts are every bit as strict as those governing the defence in our criminal law.

Turning back for a moment to the list of offences which are excluded by the Draft Code from the defence of compulsion, it will be noted that no reference is made in the case of treason to the distinction between times of war, public rebellion or insurrection and times of peace. This distinction owes its origin to Hale and the omission of any reference to it in the Draft Code may well be explained by the absence of any judicial approval for its introduction or necessity. In *R.* v. *McGrowther*, whereas the test laid down in *Oldcastle's Case* as to the degree of compulsion was approved, no mention was made of the distinction drawn by Hale. Its uncertainty seems to have been present even in Hale's mind when, having cited *Oldcastle's Case* in support, he poses the question whether the same result would have been reached if the accused had committed treason by marching with the rebels for fear of death. On the rule as stated by Hale duress would clearly have been a defence, yet he himself doubts the outcome.[19]

There is no reason to dispute the validity of compulsion as a defence to treason committed in time of public rebellion, and *R.* v.

[15] In Note A to their Report, at p. 43.

[16] In *Att.-Gen.* v. *Whelan* [1934] Ir.R. 518, the Irish Court of Criminal Appeal allowed the prisoner's appeal against conviction for receiving stolen goods, on the ground of duress.

[17] The original Canadian Criminal Code was enacted in 1892. Its draftsman, Burlidge J., framed the Code on Stephen's *Digest of the English Criminal Law* and the report of the English Criminal Code Commissioners. See *R.* v. *Martin* [1933] 1 D.L.R. 434, *per* Trueman J.A., and *R.* v. *Farduto* (1912) 10 D.L.R. 669, *per* Cross J.

[18] 16 *Corpus Juris*, § 59. See, too, *Bain* v. *State*, 67 Miss. 557, 560.

[19] As we have seen (*supra*, p. 299) the defence was in fact upheld by the court in *R.* v. *McGrowther* though rejected by the jury on the particular facts before them.

McGrowther is authority for this proposition. But further than that it is difficult to accept the dividing line drawn between war and peace. It is arguable, directly contrary to Hale's view, that where the treasonable acts are committed in time of war the defence of duress should be excluded. Where sacrifice of human life is generally accepted as the possible lot of any individual engaged in fighting for his country it may be asked why should the threat of death or serious physical injury be a good defence to the most infamous of crimes in time of war. On the other hand, circumstances constituting treason can be envisaged where it would be unreasonable to exclude the defence. Take the examples given in *R.* v. *Steane*, of British soldiers who were set to work on the Burma road or, if invasion had unhappily taken place, British subjects who might have been set to work by the enemy digging trenches. Such persons would undoubtedly be doing 'an act likely to assist the enemy' within the meaning of the Defence Regulation under which Steane was charged.[20] But as the Lord Chief Justice indicated,[21] 'it would be unnecessary surely in their cases to consider any of the niceties of the law relating to duress, because no jury would find that merely by doing this work they were intending to assist the enemy'. Such persons, it is submitted, would also be 'adhering to the King's enemies . . . by giving them aid in the realm or elsewhere' within the meaning of the Statute of Treasons 1351. It is true that no specific intention is required for this form of treason, thus excluding the possibility of duress negativing the intent. Is it conceivable, however, that any Judge would be prepared, where the facts were similar to those instanced above, to direct the jury to ignore a plea of compulsion as a possible defence? Enough has been said to show the weakness of Hale's distinction and to correct the mistaken view that duress cannot be a defence to treason. It is suggested that the more logical approach is to accept the validity of duress as a defence to treason, leaving each case to be decided on its merits.[22]

As to the other offences excluded by the Draft Code, murder stands in a class apart, the crime being so heinous that even the strongest duress should not be a justification. The same argument does not apply, for example, in the case of robbery with violence which may be committed without any actual physical violence to the victim, the mere presence of more than one person threatening

[20] Reg. 2A of the Defence (General) Regulations, 1939, provided that: 'If with intent to assist the enemy, any person does any act which is likely to assist the enemy . . . then, without prejudice to the law relating to treason, he shall be guilty of an offence against this regulation'. By the Emergency Laws (Transitional Provisions) Act, 1946, this regulation lapsed on February 24, 1946.

[21] [1947] 1 K.B. at p. 1006.

[22] Support for this view is to be found in Lord Mansfield's judgment in *R.* v. *Stratton* (1779) 21 St.Tr. 1222, in the course of which he declared (at p. 1223): '. . . if a man is forced to commit acts of high treason, if it appears really force and such as human nature could not be expected to resist, and the jury are of that opinion, the man is not then guilty of high treason'.

him being sufficient.[23] If the accused is one of such two or more threatening persons, compelled to do so by fear of being killed, should duress not be a defence? Grievous bodily harm, too, is a misnomer, as the harm caused may in effect be quite slight[24] and incomparably less than that actually inflicted upon the accused to induce him to commit the crime. Furthermore, the mere inflicting of grievous bodily harm unaccompanied by an intent to do grievous bodily harm is only a misdemeanour[25] to which, according to the Court of Criminal Appeal, the defence of duress applies. As to assisting in rape, this presumably means participation as a principal in the second degree—is such a person who, under threats of being shot at or permanently disfigured by a razor, stands some distance away ready to give warning of approaching intruders not to have any defence?

The difficulty and danger of laying down a pre-determined list of crimes in the same category as murder is obvious. The alternative is to allow duress as a defence to any crime other than murder, leaving it to the jury to decide in each case, whether, having regard to the grave or trifling nature of the effects resulting from the commission of an offence, the duress to which the accused was subjected was so exceptionally severe as to excuse him from criminal liability.

Personal Injury or Damage to Property.

This leads us to the consideration of our next question, which is this. To establish compulsion, is it necessary to show that the accused was in fear for his person, or will apprehension of danger to his property suffice? The answer seems reasonably clear, as the authorities appear to draw a well-defined distinction between these alternative types of fear. As East succinctly puts it,[26] 'an apprehension, though ever so well founded, of having property wasted or destroyed, or of suffering any other mischief not endangering the person of the party, will be no excuse'. In support, he cites *R.* v. *McGrowther* (already mentioned) in which the accused, charged with treason for having joined the rebellion of 1746, put forward as his defence that the Duke of Perth with about 20 Highlanders had come to the town where he lived and compelled him to enter into the rebel forces by threatening him, if he refused, 'to burn his house to the ground, to destroy all his cattle and stock of corn and to lay waste all that belonged to him'.

[23] See s. 23 (1) (*a*) of the Larceny Act, 1916.

[24] No definition of grievous bodily harm is contained in the Offences against the Person Act, 1861, but the test generally accepted is that laid down by Willes J. in *R.* v. *Ashman* (1858) 1 F. & F. 88 at p. 89, *viz.*, 'it is not necessary that such harm should be either permanent or dangerous, if it be such as seriously to interfere with comfort or health it is sufficient'. Thus, it need not amount to maiming, disfigurement or disablement.

[25] Offences against the Person Act, 1861, s. 20. Compare with s. 18, which is a felony.

[26] *Crown Law*, Vol. I, pp. 70, 71.

Rejecting this plea, Lee L.C.J., declared [27]: 'The only force that doth excuse is a force upon the person, and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man who makes force his defence, to shew an actual force, and that he quitted the service as soon as he could; agreeable to the rule laid down in *Oldcastle's Case*, that they joined "*pro timore mortis et recesserunt quam cito potuerunt*"'.

Actual or Threatened Injury.

It will be seen that the presiding judge required both actual force upon the person and present fear of death. Hale thought likewise, confining duress to the case of a man 'menaced with death' or 'in peril of death' [28] or faced with 'actual and inevitable danger of his own life'.[29] Blackstone, on the other hand, talks of 'threats and menaces which induce a fear of death or other bodily harm' as being sufficient,[30] and Stephen, in his *Digest* [31] similarly extends compulsion to include threats as well as actual force, and fear of grievous bodily harm as well as fear of death. Furthermore, in Article 23 of the Draft Code of 1879, the words used are 'threats of immediate death or grievous bodily harm'. Closely analogous is the test laid down in American law which requires the duress to be 'present, imminent and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done'.[32] No restriction, it will be noted, is placed on the necessity for proving actual force, and we may reasonably conclude that threats of a sufficiently grave character will suffice.

Until the recent case of *R.* v. *Steane*, the test to be applied could fairly be said to have become stabilised in requiring proof of either actual grievous bodily harm, or threats of death or grievous bodily harm. However, in that case, the Lord Chief Justice used these words [33]: 'Duress is a matter of defence where a prisoner is forced by fear of violence or imprisonment to do an act which in itself is criminal. If the act is a criminal act, the prisoner may be able to show that he was forced into doing it by violence, actual or threatened, and to save himself from the consequences of that violence'. No qualification, it will be observed, is put upon the word violence. Whereas fear of imprisonment is referred to by

[27] Fost., *Reports*, p. 13.
[28] *Pl. of the Cr.*, Vol. I, p. 51.
[29] *Op. cit.* p. 52.
[30] *Comm.*, Vol. IV, p. 30.
[31] Article 10. Having regard to this body of authority, it is difficult to reconcile the sweeping statement made by Denman C.J. in *R.* v. *Tyler* (1838) 8 C. & P. 616 (a case of murder), in which he declared: 'It cannot be too often repeated that the apprehension of personal danger does not furnish any excuse for assisting in doing *any* act which is illegal'. Cited with approval by Dr. Stallybrass in *Modern Approach to Criminal Law* at p. 425.
[32] 16 *Corpus Juris*, § 59.
[33] [1947] 1 K.B. at p. 1005.

Hale he does so, so far as can be discovered, in one passage only,[34] and that in connection with a hypothetical case of murder in which event it would never afford a legal excuse. If one is prepared to recognise the gulf that exists between threats of death or serious bodily harm and threats of mere imprisonment, it seems reasonable to declare that the inclusion of the latter kind of fear would constitute an unjustifiable relaxation of the present stringent conditions. In any case, as Steane's appeal against conviction was allowed on other grounds, the learned judge's remarks constitute only obiter dicta and should, therefore, be treated with reserve, particularly having regard to the authorities discussed above.

Injury to the Accused or his Immediate Kindred.

Another question that presents itself is whether the defence of duress should include criminal acts done by the accused under actual or threatened death or grievous bodily harm, not to himself, but to his wife, children or other immediate kindred. The old writers, as we have just seen, indicate that only violence to the accused's own person is to be considered, and Lord Goddard, in the passage cited immediately above, uses the words 'to save himself from the consequences of that violence'. Viewed independently of the early authorities it is difficult to see why any hard and fast distinction should be drawn in this connection. Many a man who regards his own personal safety as of little consequence will be subjected to the most extreme stress of mind if confronted with a threat to kill or seriously injure his wife or child. If, faced with such a dreadful eventuality, the accused commits a crime is he to be precluded from pleading duress as a defence? In *R.* v. *Steane*, discussed fully later, the prisoner swore that his conduct was governed throughout by continual fear for his wife and children, but no opinion was expressed by the Court of Criminal Appeal as to whether this fact would have sufficed to constitute duress as a defence. In that particular case the court did no more than indicate its importance when considering the burden of proving the specific intent required in the offence charged. It is submitted that fear caused by actual or threatened death or serious bodily harm to the accused's immediate kindred should be treated on the same basis as if the accused's own person was in jeopardy, each individual case being treated on its merits.

Need to Desist.

As to the requirement that the accused must desist as soon as is reasonably practicable in the circumstances, a good illustration is afforded by *R.* v. *Crutchley*.[35] The accused was charged

[34] 1 Hale 51. See, too, 1 Hale 434.

[35] (1831) 5 C. & P. 133. This case, together with *R.* v. *McGrowther*, formed the two reported cases referred to by Sir Fitzjames Stephen in the passage quoted at the outset of this article.

with the misdemeanour of breaking and destroying a threshing machine.[36] It appeared that one night a mob came to the prosecutor's farm and broke his threshing machine to pieces. Amongst the mob was the prisoner, an under-gamekeeper, who admitted giving the machine a blow with a sledge hammer, but called his headkeeper who stated that the mob had laid hold of himself and the accused and compelled both to accompany them for the purpose of breaking threshing machines. Further evidence was given that the accused and the headkeeper, before they had gone many yards with the mob, agreed to run away at the first opportunity and in fact did so. The prisoner was acquitted. Unfortunately, Patterson J.'s direction to the jury does not appear in the report of the case, but there can be no doubt that the decision is in accordance with established principles. As Lord Mansfield declared in *R.* v. *Stratton*[37] 'though compulsion takes away the criminality of acts . . . yet it will not justify a man in acting farther than such necessity obliges him, or continuing to act after the compulsion is removed'.

Time when Duress must be Operative.

Furthermore, it must be clearly shown that the overpowering of the accused's will was operative at the time the crime was actually committed. Hale makes this self-evident condition abundantly clear when he writes,[38] with particular reference to treason, 'if the whole circumstances of the case be such that the prisoner can sufficiently resist, or avoid the power of such rebels, he is inexcusable, if upon a pretence of fear, or doubt of compulsion, he assist them'. Owing to the paucity of English authorities, we must turn for our example to the Irish case of *Att.-Gen.* v. *Whelan*.[39] The accused, charged with receiving stolen goods, admitted receiving a stolen box containing silver coin but stated that he had done so under threats made by the thief who was armed with a revolver. After the thief's departure, the prisoner took no steps to restore the money to its lawful owner, or to give any information about it, saying he was afraid and that the thief had made a specific threat to shoot him if he told anything about it. At the request of counsel for the accused, the jury were asked, in reaching their finding, to answer the question whether, at the time Whelan received the money, he acted under the threat of death or serious violence. Despite the jury's answer in the affirmative, the accused was convicted, and consequently he appealed to the Irish Court of Criminal Appeal on the ground that the jury's finding amounted to an acquittal. After an exhaustive review of the

[36] An offence under 7 & 8 Geo. 4, c. 30, s. 4.
[37] (1779) 21 St.Tr. 1222, at p. 1231.
[38] *Pl. of Cr.*, Vol. I, p. 51. See, too, Stephen, *Digest*, Article 10: also the proviso to art. 23 of the Draft Code, which reads 'provided that the person under compulsion believes that such threat will be executed'.
[39] [1934] Ir.R. 518.

authorities, the court accepted the prisoner's submission and quashed the conviction.

Number of Persons Exerting Duress : Innocence of Accused.

Two minor points call for brief discussion. The first is concerned with the number of persons who impose duress upon the accused. Unfortunately there exists a conflict amongst the authorities. Stephen contemplates the necessity for at least two persons,[40] whereas the Draft Criminal Code recognises the sufficiency of one individual.[41] The latter would appear to be the more practical attitude, it being a question of degree whether a certain individual's will can be overborne by one or several persons. One man with a revolver may well compel where several with bare fists may fail.[42] As to the second point, English and American law agree that compulsion must have arisen without the fault of the person who insists upon it as a defence.[43] Thus, where a prisoner is shown to have been a party to any prior association or conspiracy, in consequence of which he renders himself subject to such compulsion, he will not be allowed to plead duress.

Burden of Proof.

Then there is the question of burden of proof. Duress is a matter of defence, and the onus of proving it is on the accused; but, as the Court of Criminal Appeal in *R.* v. *Steane* were at pains to point out, that burden does not arise until the prosecution has made out its case. Thus, where the offence charged requires a specific intent it is for the prosecution to prove to the satisfaction of the jury that the accused had that particular intent, and not until it has done so does the burden swing on to the accused to prove duress as his defence. This principle is well illustrated by the facts in *R.* v. *Steane*. The accused, a British subject, was on the outbreak of war employed in Germany as a film actor. Whilst he himself was immediately arrested his wife and two sons, who were also resident in Germany, were left alone. Shortly after internment he was asked to broadcast but refused. There followed various threats as to German methods of persuasion and eventually Steane submitted to a voice test. Soon he was broadcasting news daily and continued to do so until April, 1940. On his refusal to continue he was visited by two Gestapo men who, according to his story, said to him ' If you don't obey, your wife and children will be put in a concentration camp '. Still refusing, he was visited in May by three Gestapo men who beat him up badly, one ear being partly torn off. As a result he agreed to help produce films. Steane swore that he was in continual fear for his wife and children, that

[40] *Digest*, Article 10. [41] Art. 23.
[42] Thus, threats by the thief, armed with a revolver, were held sufficient in *Att.-Gen* v. *Whelan*.
[43] See Art. 23 of the Draft Code, and 16 *Corpus Juris*, § 59.

he never had the slightest idea or intention of assisting the enemy, and that what he did was done to save his wife and children. On that evidence he was charged, and convicted, with doing acts likely to assist the enemy with intent to assist the enemy contrary to Reg. 2A of the Defence (General) Regulations, 1939.[44] His appeal against conviction was allowed on the ground of inadequate direction, the trial judge having failed to point out to the jury the necessity for satisfying themselves, where a specific intention is an essential ingredient in the crime, that the acts charged were done with that particular intent.

The burden of proving that intent rests squarely on the shoulders of the prosecution. Of course, as the Court of Criminal Appeal pointed out,[45] if the natural consequence of doing the act charged is to produce a certain result and no evidence or explanation is given by the accused, then a jury may justifiably find that the prisoner is guilty of doing the act with the intent alleged. An example of this is where the accused is charged with stealing. Evidence that the prisoner picked another's pocket would, in the absence of any explanation by the accused, indicate a felonious intent sufficient for a jury to properly convict of larceny. On the other hand, said Lord Goddard,[46] 'it is impossible to say that where an act is done by a person in subjection to the power of others, especially if that other be a brutal enemy, an inference that he intended the natural consequences of his act must be drawn merely from the fact that he did it. The guilty intent cannot be presumed and must be proved'. We see, therefore, whether or not the accused puts forward duress as his defence, that evidence of subjection to the power of another in the form of personal violence, ill-usage or threats of the same is always relevant to the issue whether or not the accused had the specific intent required.

Applying these principles to the facts before them, the Court of Criminal Appeal indicated[47] that 'while the jury would be entitled to presume (the criminal) intent if they thought that the act was done as the result of the free uncontrolled action of the accused, they would not be entitled to presume it, if the circumstances showed that the act was done in subjection to the power of the enemy, or was as consistent with an innocent intent as with a criminal intent, for example, the innocent intent of a desire to save his wife and children from a concentration camp. They should only convict if satisfied by the evidence that the act complained of was in fact done to assist the enemy, and if there was doubt about the matter, the prisoner was entitled to be acquitted'.

The conclusion to be drawn from *R.* v. *Steane* is that where evidence indicating threats of, or actual, physical violence is called

[44] See note 20, p. 301, *supra*.
[45] [1947] 1 K.B. at p. 1004.
[46] *Ibid.* at p. 1006.
[47] *Ibid.* at p. 1006.

by the accused it will be directed, first, to negativing any specific intent required in the crime, and secondly, to establishing duress as a defence. Only if the specific intent is proved does it become necessary to consider the accused's plea that his will was overborne by the unavoidable duress to which he was subjected.

Summary

To sum up, where compulsion or duress is relied upon as a defence and no special relationship is indicated, it is suggested that, to succeed, the accused must prove :

(1) That his will was overborne through fear caused by *either* the actual infliction of serious bodily harm or threats of death or serious bodily harm to his own person, *or*, actual or threatened death or serious bodily harm to his wife, children, or other immediate kindred. Threats of injury to property will not suffice.

(2) That the compulsion was exerted at the time the crime was actually committed.

(3) That he desisted from the criminal act as soon as was reasonably practicable in the circumstances.

(4) That the compulsion arose through no fault of his own.

(5) That where an inherently grave offence is committed the duress exerted upon the accused was so severe and so great in proportion to the harm done or injury suffered by the victim as to excuse from criminal liability. In the case of murder, duress should never operate as a defence.

Where a Special Relationship Exists

Next, let us examine what extensions, if any, exist in the application of duress where some form or other of special relationship can be shown. The word 'extensions' is used deliberately to stress the fact that, whether or not particular conditions apply in special circumstances, there is nothing to prevent the accused, if he can satisfy the conditions already enumerated, from also pleading compulsion like any other member of the community. It would be interesting to consider the situation where a subordinate commits a crime in carrying out the order of his civilian or military superior, but an adequate examination of this extensive topic is impossible within the confines of this article. It is therefore proposed to limit the discussion to the relationships, first, of parent and child, and secondly, of husband and wife, the latter being by far the most important relationship in this connection.

Parent and Child

A crime is not excused on the ground of duress simply because it was committed by a child by command of his or her parent.[48]

[48] Hale, *Pl. of Cr.*, Vol. I, p. 44. A similar position exists in American law, 16 *Corpus Juris*, § 59.

Of course, if the child is too young to be legally responsible it cannot be made criminally liable for its acts. It is certainly strange, one might almost say incongruous, that the presumption of coercion, which existed before 1925, never extended to any relationship within the family group other than that of husband and wife. The presumption has disappeared even for the wife, but the fully responsible child, in comparison with its mother, it still in an invidious position when the question of coercion arises in criminal law. Considerable misgiving may be felt as to whether such an unwarrantable distinction is really justifiable today.

HUSBAND AND WIFE [19]

Finally, we turn to the situation where a wife commits a crime under the coercion of her husband. It will be remembered that the word 'coercion' has generally become exclusively associated with the relationship of husband and wife, and it is with the conditions underlying the defence of coercion, as opposed to pure compulsion, that we are now concerned. It is not proposed to discuss the historical background to coercion as a defence but to turn at once to the present position which rests on section 47 of the Criminal Justice Act, 1925. This section provides:

> 'Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished. But on a charge against a wife, for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband'.

On a superficial reading of the above section the present law governing coercion would appear to be quite clear, but a closer examination will, as we shall see in a moment, reveal the uncertainty of its underlying conditions. It is certainly true that the Act of 1925 has clarified certain difficulties which existed before its enactment, but others remain unsolved. The scope of coercion as a defence can now be stated quite definitely—it applies to any offence, whether indictable or summary, with the exception of treason and murder. This being so, it will be observed that, so far as murder is concerned, neither compulsion nor coercion has any application. But, in regard to treason, whereas coercion is excluded in any circumstances, it is important to remember that a married woman may still avail herself of the more stringent defence of compulsion, like any other member of the community.

Turning to the necessity for proving that the offence was committed (a) in the presence of, and (b) under the coercion of the defendant's husband, it must be emphasised that both these

[19] Concubines have no special protection: *R.* v. *Court* (1912) 7 Cr.App.R 127.

conditions require to be proved.[50] So much is apparent, but what is still a matter of conjecture is the test to be applied in deciding whether or not these essentials are fulfilled. Let us consider each element in turn.

'In the Presence of the Husband.'

First, when may a crime be said to have been committed 'in the presence of the husband'? Take the following examples. A is the wife of B. Instigated by fear of B, A proceeds to call at various houses and in each case is admitted alone, whereupon, telling a false story, she obtains varying sums of money. All this time B remains outside in the street. A is charged with obtaining money by false pretences and pleads coercion. Strictly speaking, A committed the crime in B's absence, but it is suggested that to bring the facts within the rule it is not necessary that the husband should be in the immediate presence of the wife, it being sufficient to prove that he was near enough materially to influence her conduct.[51] Suppose on the other hand, that A is charged with burglary, the breaking having been effected one night and the entry on a subsequent night.[52] B is shown to have been present on the latter occasion only. Assuming coercion to have been exerted on both occasions, is it fatal to the wife's defence that she is unable to prove her husband's presence throughout the commission of the whole crime? It is suggested that the reasonable interpretation to be placed on section 47 is that a crime which is *completed* in the husband's presence is in fact committed 'in his presence' and that, therefore, in the hypothetical example above, A is not guilty.

'Under the Coercion of the Husband.'

Secondly, we have to consider what constitutes coercion of a wife by her husband. Little assistance can be found in the authorities before 1925, presumably on account of the then existing common-law rule that where a criminal act was committed by a wife in the presence of her husband it was presumed that she acted under his coercion; of course, it was open to the prosecution to rebut the

[50] As a matter of interest, it is worth noting that the terms of reference of the Avory Committee, appointed in 1922 to consider the responsibility of a wife for crimes committed under the coercion of her husband, declared these two conditions to be alternative rather than complementary to one another. See the Report of the Committee, Cmd. 1677, published the same year. If this distinction was made intentionally it is difficult to understand for, in 1922 as now, if a wife committed a crime in her husband's absence, his previous acts of coercion would afford her no defence.

[51] Such is the test adopted in the American courts, it being said in *State* v. *Nowell*, 156 N.C. 648, at p. 652, that 'it is not necessary to show that the act was done literally in sight of the husband, but it is sufficient to raise the presumption if it was done near enough to her husband to be under his immediate control or influence'. The presumption, abolished in our criminal law by s. 47 of the Criminal Justice Act, 1925, remains in full force in American law. In Canada the old common-law rule was abrogated by s. 21 of the Canadian Criminal Code.

[52] Burglary is defined in the Larceny Act, 1916, s. 25.

presumption by adducing evidence proving that the wife was a free and active accomplice in the crime.[53] Twenty-six years have now elapsed since the abolition of the common-law presumption, and one would expect to find that the Court of Criminal Appeal had taken the opportunity, on a suitable occasion, to give an explanation of the doctrine of coercion, which would act as a guidance to the lesser courts. No such authoritative declaration has, unfortunately, been forthcoming.

The same reticence was displayed by the Criminal Code Commissioners in their Report upon the Draft Code of 1878, in which they recommended the abolition of the common-law presumption. The Avory Committee in 1922 likewise avoided the task of defining coercion, a fact which is easily explained by their outright denunciation of the defence and their unanimous recommendation that it should be abolished. In 1925, the Legislature adopted the former recommendation, incorporating it in section 47 of the Criminal Justice Act. During the debate in Parliament on the pertinent clause, the case for retention of coercion as a defence was put forward by the Solicitor-General [54] who indicated in a very revealing passage that it gives a wife a rather wider and more extended line of defence than pure compulsion, because coercion imports coercion in the moral, possibly even in the spiritual, realm.[55] Such a declaration is, of course, by no means authoritative, it being the mere language of Parliamentary debate, but it is extremely interesting to study its practical application.

Presumably, the meek and obedient wife will be able to avail herself of a greater degree of protection than her forceful and spirited neighbour. Suppose, for example, that a particularly credulous wife could show that she had been tamed into believing that failure to obey her husband's every command would inevitably result in her being doomed to suffer the fires of hell, would such spiritual terror suffice to prove coercion? Or take the case of a wife who had been inculcated with her husband's teaching that to steal from the rich to help the poor was right and just, would such misguided moral coercion afford her any excuse? If so, what about threats not to provide any money to purchase food for the wife and children, or to desert the wife, or to bring a concubine home to live under the same roof? Are all these to be considered as coming within the ambit of coercion? In the absence of any authorities one is left guessing, but it is suggested that one point

[53] The application of this rule in *R.* v. *Peel* (*The Times*, March 14 and 15, 1922), a case involving betting frauds, caused a general public outcry which was met by the appointment, the same year, of the Avory Committee. Despite the evidence in *Peel's Case* that the accused, a married woman, was acting for her own personal pecuniary benefit, the trial judge directed the jury to return a verdict of acquittal, on the ground that there was no evidence (*sed quære*) to rebut the common-law presumption that Mrs. Peel was acting under the coercion of her husband.

[54] Sir Thomas Inskip, later to become Lord Caldecote L.C.J.

[55] *Parliamentary Debates* (1925), Vol. 188, col. 875.

is clear, namely, that the test must be subjective rather than objective. It must be left to the jury to decide whether, in the particular circumstances, they are satisfied that the accused wife—not the ordinary, average wife (if, indeed, such a standard could possibly be determined)—was under the domination and control of her husband to such an extent that the exercise of her own free will was rendered impotent.

The question has often been asked whether the time has not come to abolish the defence of coercion altogether. We have already seen that the Avory Committee in 1922[56] unanimously recommended that such a course should be taken, leaving the wife to bring herself within the general defence of compulsion. In reaching this conclusion, the Committee examined the law on the subject as it appears in the Indian Penal Code, in certain criminal codes of the colonies, in the common law of South Africa, in Scotland and in the U.S.A. It is worth noting the varying extent to which coercion is recognised by these respective countries.

The Indian Penal Code[57] does not recognise coercion by the husband as any defence, whereas the Canadian Criminal Code[58] is in accord with the present position in this country. According to the common law[59] of South Africa,[60] the defence is recognised and has a wider operation than in English law in that it does not exclude even treason and murder. In Scotland[61] a wife's plea of subjection is relevant only as regards mitigation of punishment and in the U.S.A., as indicated earlier, there still remains the presumption that where a criminal act is committed by a wife in her husband's presence she is presumed to be acting under his coercion. But such presumption does not arise where the crime is a heinous offence, such as murder or treason.[62]

Prominence was also given by the Committee to the views of Sir Fitzjames Stephen who felt that ' as matters now stand and have stood for a great length of time, married women ought, as regards the commission of crimes, to be on exactly the same footing as other people '. Despite such a formidable body of opinion the Legislature, in my view rightly, refused to adopt the Committee's recommendation, leaving coercion as a possible defence to criminal liability. To advocate the abolition of the defence is surely to close one's eyes to the fact that, however far we have progressed towards the doubtful goal of equality of the sexes, the subjugation of the wife is still regarded by certain sections of the community as the

[56] Its composition was as follows: Mr. Justice Avory (Chairman), Sir Ernest Pollock, Judge Sir Alfred Tobin, G. J. Talbot K.C. (later Talbot J.), Sir Richard Muir, Sir Travers Humphreys (now Humphreys J.), H. D. Roome K.C.

[57] Mayne, *Criminal Law of India*, 4th ed., p. 129.

[58] Section 21 of the 1927 Code.

[59] *I.e.*, Roman-Dutch law.

[60] Gardiner, *South African Criminal Law*, 5th ed., Vol. 1, p. 86.

[61] Macdonald, *Criminal Law of Scotland*, 5th ed., citing *Hume*, i. 47–49.

[62] Whether the presumption arises in cases of robbery is still doubtful. See 30 *Corpus Juris*, § 420.

proper relationship in marriage.[63] It is true that a number of strides have been made towards rectifying this undesirable state of affairs, even to the extent, sometimes, of reversing the balance. But there still remains a considerable proportion of married women who regard their husbands as their lord and master, to disobey whose commands would be unthinkable. In the case of murder and treason, public policy has rightly dictated that no protection shall be extended to a married woman who commits such an offence under the coercion of her husband, but, it is suggested, society has not yet developed sufficiently to justify the complete abolition of coercion in our criminal law.

SUMMARY

Finally, let us attempt to summarise the principles to be applied where a plea of compulsion or coercion is put forward and some special relationship is shown to exist.

(1) In every case it must be remembered that the accused can avail himself or herself of the general plea of compulsion or duress, independently of the availability of any special provisions that might apply in the circumstances.

(2) The plea of compulsion is not maintainable simply because a crime is committed by a child by command of its parent.

(3) As to the defence of coercion by a wife, it extends to any crime other than treason or murder, within the following conditions :

(i) the crime must be completed in the presence of the accused's husband ;

(ii) it is not necessary to show that the criminal act was done literally in sight of the husband, but it must be shown that he was near enough to exercise immediate control or influence over his wife's conduct ;

(iii) the test as to whether or not the wife was acting under the coercion of her husband is subjective, not objective ;

(iv) it must be left to the jury to decide whether, in the particular circumstances, the accused wife was under the domination and control of her husband to such an extent that the exercise of her own free will was rendered impotent ;

(v) coercion imports something wider than threats of, or actual, bodily harm ; it may well extend to include threats deriving their force from the moral or spiritual realms.

In conclusion, it must not be forgotten that, even where compulsion or coercion is not available as a defence, it will generally be a mitigating factor in considering the question of punishment.

J. LL. J. EDWARDS.*

[63] For the contrary view, see Viscount Simon's remarks in *Holmes* v. *D.P.P.* [1946] A.C. 588 at p. 600.

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THE LAW OF CHEQUES: THE INDORSEMENT ASPECT

Mr. Milnes Holden's scholarly exposition of the law relating to cheques, in the January issue of this Review,[1] is a valuable contribution to banking thought, and many will have welcomed especially his attack on the dogma that 'negotiability' should in all circumstances be an inviolable principle. But those who are familiar with the discussion which has been going on for some years in the banking periodicals, and occasionally elsewhere, as to the possibility of abolishing indorsements, may well disagree with his principal conclusion, the 'Suggested Reform' of his title. The twofold purpose of this present article is to suggest that Mr. Holden has seriously underestimated the case against indorsements, and to submit that most if not all of the advantages of his proposed new mandate (which we may hereafter call for convenience the New Instrument) can be obtained by abolishing the legal necessity for indorsements. The combination of increased safety with greatly reduced work for banks and public alike provides, to the minds of proponents of the abolition, a well-nigh unanswerable argument.

It may be proper here to recall that Mr. Holden, after pointing out the weakness of the present cheque system as a safeguard against the thief, suggested that a new order should be introduced, concurrently with the continuation of the present cheque, in the form: 'Pay—ONLY', and having on its reverse a receipt in the words: 'Received from the drawer the amount specified on the face hereof'. The order would be crossed, and would bear the words: 'This order is NOT TRANSFERABLE and can be collected only through a banker. The receipt on the reverse requires the payee's signature'.

It is important to emphasise at once that Mr. Holden's main consideration, the devising of a safer means of transferring money than the present cheque system, is one which should be paramount in the discussion. When the thief has been at work it is of little satisfaction to the community that the paying or collecting banker has been successfully saddled with the loss; still less that, as perhaps more often happens, the drawer of the cheque has been unable to recoup himself from anyone. The thief's success is the main calamity, and anything that makes his work more difficult is, prima facie, a good thing.

But there are other considerations involved. One of them is the enormous inconvenience of the indorsements required on

[1] 'Suggested Reform of the Law Relating to Cheques', *Modern Law Review*, Vol. 14, p. 33.

cheques as used at present (and equally, of course, of the receipt-indorsement of the New Instrument). This inconvenience has been thoroughly canvassed in some of the articles cited by Mr. Holden,[2] and it is perhaps enough to point out here that a firm or a company receiving a large number of cheques daily has to impress a rubber stamp on the back of each and, this of course being insufficient in itself, add the signature of one of its officials, usually a comparatively junior clerk whose signature is 'official' for no other purpose.[3] The rubber stamp is often itself an impressive indictment of the system, containing as it sometimes does as many as ten or a dozen variants of the name of the concern. When the cheques are paid into a bank the clerk receiving them must examine each to see that the indorsement is correct in form; and when the cheques reach their various paying banks, each must again be examined for the correctness of the indorsement.

If any purpose were served by this elaborate procedure it might be justifiable. But it must be remarked that paying and collecting banker alike are concerned only to see that what is written on the back corresponds exactly with what is written on the front. Neither is in the least concerned to inquire whether the indorsement is actually that of the payee,[4] unless there are circumstances which put him on inquiry; and it is this point, of course, that mainly provokes the bank clerk to ask what point there is in his customers' and his own work. The thief is the most careful of men when the cheque needs indorsing; and it might even be argued that an irregular indorsement raises a presumption that the cheque has been paid in by the true owner.[5] Yet the scrutiny continues, and the more timid or more punctilious bank official returns small cheques unpaid for a wide variety of reasons,[6] none of them of any real importance.

[2] In his footnote (62) to page 47.

[3] The Director and Secretary of Bourne and Hollingsworth, Ltd., wrote from bitter experience in *The Accountant*, April 9, 1949; and a leading article in the same issue enlarged upon his letter: Vol. 120, p. 277.

[4] Many men regularly pay in their wives' cheques to their joint accounts. When, in the bank, they find that they have omitted to see that their wives have indorsed the cheques, they cheerfully sign their wives' names on the backs of the cheques, often under the benevolent eye of the receiving cashier, and sometimes at his prompting.

[5] *The Law Reports* contain, as Mr. Holden pointed out, many examples of successful actions against the banks for conversion. There is a comparatively small proportion concerned with irregular indorsements, one of the most noteworthy being *Bavins* v. *London and South-Western Bank, Ltd.* [1900] 1 Q.B. 270, in which no one seems to have taken much notice of the indorsement until the Court of Appeal observed that, in its illegibility, it *seemed* to be different from the payees' name on the face of the cheque!

[6] *Sheldon's Practice and Law of Banking*, 6th edn., gives thirteen pages of specimen 'correct' and 'irregular' indorsements. It is common experience in the banks that the ordinary private customer finds it impossible to understand the subtleties of the rules—why, for example, Colonel John Smith must not so indorse, but *may*, if he wishes, add after the essential 'John Smith' any elaboration of 'Colonel' to which he is entitled.

An incorrect indorsement may lose for the collecting banker the protection of section 82 of the Bills of Exchange Act; for the paying banker a correct indorsement is a rather more positive protection, in that it may be said to show that the drawer's mandate has been carried out. It is submitted, however, that any real purpose that the indorsement on a cheque might serve in present conditions is entirely vitiated by the fact that it only purports to be that of the person making it, and no attempt is made to check that it is what it pretends to be. To the practical uselessness of the indorsement must be added the fact that in law it has almost no significance; indeed, it has been suggested that the banker may not be entitled to insist upon it at all.[7] The banker who is held to have been negligent for his failure to notice an irregularity in something which the law does not require to be there may be forgiven for feeling some irritation.

Now it is clear that the New Instrument would greatly increase the safety of the transfer of money: it is not transferable, and it must be paid into the account of the payee. It would not be easy to accustom the public to its use, and it would not lighten the work of the banks (who would have to apply different standards to the two forms of instrument which would be passing through their hands for many years)[8]; but neither of these objections would be conclusive if no other proposal were put forward to increase the security of what Mr. Holden has amply demonstrated is not a fully efficient system.

Let us consider how the double object of security and the ending of indorsements can be attained. Mr. Holden has himself almost provided the answer, only to scout it: he suggests[9] that the Clearing Bankers might agree amongst themselves to indemnify each other for the absence of an indorsement on any cheque collected for the account of the payee, leaving 'third party' cheques and those cashed over the counter still requiring indorsement. This suggestion can be carried a little way further, and legislation drafted which would remove from paying and collecting banker alike the duty of examining indorsements—with the vital proviso that bankers would collect for others than the payees only at their peril. It will be noted that there is here no prohibition of indorsements; they merely become unnecessary. There is, strictly, no infringement of the sacrosanctity of negotiability; there is merely a strong discouragement of the negotiation of what, as Mr. Holden has pointed out, no longer needs to be negotiated.

The immediate practical effect of such legislation would be that bankers would refuse to accept 'third party' cheques, save for

[7] Chorley, *Law of Banking*, 3rd edn., p. 79, 106 *et seq.*

[8] The New Instrument must be taken only for the payee's account; the old cheque may be taken for third parties—except in those many cases where 'third party' cheques already put the collecting banker on inquiry.

[9] P. 47.

those customers whom they regarded as substantial, and even then perhaps only after inquiry. It is very probable that after a comparatively short space of time the collecting of 'third party' cheques would virtually cease; but for as long as bankers chose to take the risk of such collection it would be entirely a matter for their own business judgment. The responsibility for doing so would be theirs, and the interests of the true owner would be adequately protected—save, indeed, in circumstances such as those of *Smith* v. *The Union Bank of London* (1875),[10] cited by Mr. Holden, in which the negotiability of the cheque served to deprive the payee of the title of true owner. The theft of an already indorsed cheque is naturally not of so frequent occurrence as that of a cheque still unindorsed; and were the necessity for indorsement to be removed, such thefts would become even more rare. Even so, it might be a matter for consideration whether the proposed legislation should be extended to cover such special circumstances. This would almost certainly involve the first encroachment upon the doctrine of negotiability; it is debatable whether the increasingly small dangers of the *Smith* decision would make such an encroachment necessary.

The difficulties of the payee who has no banking account would be no greater than those of the payee of the New Instrument; and Mr. Holden suggests himself[11] that the number of such payees is so small as to be negligible. A further, and perhaps more important, point is that this proposal does nothing to interfere between the drawer and the payee of the cheque. If the drawer wished to call for a receipt on the back of the cheque he might do so, and in most cases the payee would provide it; but it would be no business of the banker to see that he did so.[12] The provision of receipts for the drawer on his cheques is a convenience the enforcement of which never should have become the responsibility of the banker; and under the new arrangement the drawer would be no worse off, when the payee failed to give the receipt, than he would be if he had called for an ordinary, separate, receipt which was not in fact forthcoming. Moreover, he could still establish, in case of need, as he can now, the account to which his cheque had been credited. With the increasing rarity of 'third party' collections, this would usually prove that the payee had in fact received payment.

[10] 1 Q.B.D. 31; cited by Mr. Holden, p. 38.

[11] P. 52.

[12] At present if a customer wishes to print any form of receipt on the back of his cheques the banker requires an indemnity from him, lest the signing of the receipt may be considered a 'condition' of payment making the instrument something other than an unconditional order. Such a receipt, under the present suggestion, could never become a condition, for it is fundamental to the suggestion that the banks would collect and pay a cheque even were the receipt not signed. Traders could thus use the receipt freely, losing only the banks' enforcement of it, and it could be clearly differentiated from an indorsement. It might even be printed on all cheques, by the banks themselves, as a new general facility, preceded by the words: 'This is not an indorsement'.

It may be remarked that the proposal gives rise to none of the three problems which Mr. Holden saw in the New Instrument.[13] It avoids too the objection to the 'Pay X only' cheque dealt with earlier by Mr. Holden,[14] for the cheque would remain normally an instrument payable to order. The discouragement of 'third party' collections, combined with the unqualified liability of bankers making such collections, would provide an almost complete protection for the true owner, and at the same time the labour of indorsing, and examining the indorsements on, *all* cheques would be avoided, save only those cashed over the counter, as to which more is said later. All this, it may be added, would be achieved without the need for 'selling' a new idea to the public; for indorsements could continue for as long as any individual cared to continue making them; and the force of inertia would be powerful towards their disappearance, just as it would be a notable obstacle to the introduction of the New Instrument.

The open cheque cashed over the counter might continue to be indorsed without great inconvenience to anyone; but if so radical a step were taken as the supersession of indorsements on the great majority of cheques drawn, it might well be questioned whether any practical purpose would be served by retaining them even here. The paying banker is usually quite unable to satisfy himself as to the identity of the person presenting the cheque for payment, nor indeed is any duty imposed on him to do so, provided that the cheque is 'properly' indorsed; and there is doubt as to whether the 'indorsement' is in such cases an indorsement at all.[15] If the proposed legislation absolved the banker from the need to call for indorsements even on open cheques presented over the counter it is hard to see how his customer would be in any way worse off: today he issues an open cheque at his own risk, and in most cases he realises that fact, for no instrument is so clearly open to abuse. The indorsement is no protection to him, and there seems to be no reason why the banker should continue to concern himself with a formality which in fact is no proof that he has obeyed his customer's mandate. Bankers have always encouraged the use of crossed cheques, and their efforts have met with considerable success. It is possible that the removal of the 'protection' of the indorsement on the open cheque (even though the protection is in fact illusory) would be a further nail in that inefficient instrument's coffin.

It must be added that neither the New Instrument nor the present proposal does anything to forestall the thief who in good time opens an account in the name of the payee of the cheque he proposes to steal. The New Instrument would be as susceptible

[13] P. 49.
[14] P. 46.
[15] *Chorley, op. cit.*, p. 107.

to theft of this kind as the old cheques have proved to be [16]; but the indorsement is as useless in these circumstances as it is in all others to prevent theft. While the banker does, and should, satisfy himself that firm and company customers are what they claim to be, it is not easy for him so to satisfy himself with private persons, beyond the usual 'references'. Asking for sight of identity cards is a procedure which in the temper of the times would not commend itself.

Nothing here said affects, of course, the independent suggestion made by Mr. Holden that section 82 of the Bills of Exchange Act needs reform; his outline of the position today [17] shows how absurd it is. It may be said, however, that the legislation here suggested would in fact remove some of the unfortunate results of the bankers' lack of protection when collecting open cheques, for the tendency to collect cheques only for the payees themselves would itself prevent a majority of the losses which may at present be incurred.

The argument for legislation on the lines suggested may be summed up :

(a) Banks and the business community would benefit greatly from the virtual abolition of indorsements, even were there no increase in the security of the transfer of money; but in fact,

(b) the increased security resulting from the banks' refusal to collect 'third party' cheques would be as great as that resulting from a new, non-transferable, instrument, while

(c) the difficulties, to banks and businessmen alike, of a duplication of instruments would be avoided.

Certainly some reform of the law is needed: the Bills of Exchange Act is, indeed, out of date in other places than section 82 merely. But wholesale reform is not likely, and the present suggestion might without great difficulty be implemented to the considerable benefit of all parties concerned.

P. E. SMART.*

[16] In *Ladbroke* v. *Todd* (1914) 19 Com. Cas. 256, for example, only the banker's negligence in not making inquiries concerning his new customer enabled the drawer of the cheque to recover from him.

[17] P. 51.

* Mr. P. E. Smart, LL.B., A.I.B., is a bank official.

STATUTES

Statute Law Consolidation and Revision

Thanks to the invaluable work of the Statute Law Committee the Statute Book has undergone a spring cleaning which has substantially transformed its appearance and made it, if not beautiful, at least bearable. Since 1948 some twenty consolidation Acts have been passed with the result that considerable areas of impenetrable jungle have been converted into reasonably well-tended forests. Of these Acts perhaps those of most interest to the practitioner relate to Adoption, Arbitration, Patents, Designs, Elections, Marriage and Matrimonial Causes. The last-named, the Matrimonial Causes Act, 1950, is a particularly useful step towards a better arrangement of the Statute Book, for it separates the provisions relating to matrimonial causes from the Judicature Acts, in which they have previously been imbedded, and republishes them in a short Act of 35 sections.

Three exceptionally large undertakings—consolidation of the law relating to income tax, to customs and excise and to magistrates' courts—are well in hand, and a draft Income Tax Bill has recently been published upon which comments have been invited. The draft Bill reveals very clearly how many inconsistencies have resulted from haphazard growth from Finance Act to Finance Act but it is apparently hoped that amendments required will not be too extensive to prevent the Bill from being dealt with under the new and expeditious consolidation procedure. If any account is to be taken of the recommendation of the two Tucker Committees and the Cohen Commission it is difficult to see how this hope can be realised. In the case of customs and excise and magistrates' courts it is not intended to attempt to use this procedure since considerable changes will be needed in the existing law but it is expected that the resulting Bills will pass rapidly as uncontroversial after reference to expert Departmental Committees.

In addition to this work of consolidation, useful progress has been made with a number of unspectacular works of law reform; recent examples are the Medical Act, 1950 (relating to registration and discipline of medical practitioners), and the Maintenance Orders Act, 1950 (relating to jurisdiction to make and enforce such orders throughout the U.K.). The Lord Chancellor has also appointed various committees to consider further projects (notably that of amending the law of intestate succession) although it seems regrettable that he has not yet seen fit to reconstitute a permanent Law Revision Committee. The promised Royal Commission on Divorce Law will also be welcomed.

The work of revision of the formal sources of Statute Law has also proceeded apace. Statute Law Revision Acts were passed in 1948 and 1950 and the third edition of the Statutes Revised has just been published. For the first time, simultaneous publication of all volumes was successfully attempted and all living Acts, from the birth of Parliament to the end of 1948 can now be found in no more than thirty-two volumes (with an additional volume of Measures of the Church Assembly). Simple directions enabling them to be noted up are to be published annually. A new edition of the Index to the Statutes in Force to the end of 1948 has been published and a further edition, including all Acts to the end of 1950 is in preparation. And, before this appears in print, the new Chronological Table of the Statutes (to the end of 1950) should be available.

Perhaps of even greater value is the third edition of S.R. & Os. and S.Is. Revised which is in the course of publication and which is expected to be completed in about twenty-eight volumes by the end of the year. Here, too, there will be arrangements for keeping it up to date, in the form of an inexpensive cumulative supplement. A new edition of the Index to the Orders in Force appeared in December, 1950, covering the period to the end of 1949.

Finally, there has been a new edition of the Consolidated Index to Local Acts (1801–1947).

These efforts have made a very real contribution to the task of making our enacted law more accessible to lawyer and layman, who owe a great debt of gratitude to all concerned. Provided there is no flagging of the determination to prevent accumulations of arrears, the prospect of future accretions may be faced with comparative equanimity in the knowledge that these are accompanied by the cutting out of the dead wood which has hitherto obscured the living growth.

L. C. B. G.

REPORTS OF COMMITTEES

The Royal Commission on Betting, Lotteries and Gaming, 1949–51

The Report of the Royal Commission on Betting, Lotteries and Gaming, 1949-51,[1] has observed the traditions of such Reports in one respect at least. It has united in opposition to some of its proposals the Churches Committee on Gambling and the Bookmakers' Protection Association.[2] Indeed, the tone of the Report made it unlikely that it would receive widespread or fervent support. Neither the ardent gamblers nor the ardent anti-gamblers will find it much to their liking, and even those who dislike gambling but are prepared to let others go to the Devil in their own way will probably receive it with little enthusiasm. This comment is by no means intended to be derogatory, but reasonableness and compromise do not awaken strong feelings. That such adjectives characterise the Report may perhaps be best shown from its conclusions on the scope of gambling. As to economic effects the comment is (169) : " We conclude that gambling, on the scale on which it is indulged in at the present time, cannot be regarded as imposing a serious strain on our national resources and manpower '; as to gambling as a cause of crime the Report states (177) ' that gambling is of no significance as a direct cause of serious crime and of little importance, at any rate at the present time, as a direct cause of minor offences of dishonesty '; as to the general demoralising effect of gambling the Report concludes (180, 183) that the great majority of gamblers do not spend money recklessly on gambling without regard to the consequences on the standard of living of themselves and their families. Against such statements, however, the Commissioners record their opinion (185) that ' no sensible man could but wish that gambling played a less prominent part in the life of this community than it does '. The remedy, they conclude, is to be found in public opinion, education and the provision of other facilities for pleasure, rather than in law. The function of law is ' to interfere as little as possible with individual liberty to take part in the various forms of gambling, but to impose such restrictions as are desirable and practicable to discourage or prevent excess ' (186). For this purpose the law should (189) apply uniformly throughout the community, gambling should be conducted as far

[1] Cmd. 8190. Numerical references in parentheses throughout this note are to paragraphs of the Report.

[2] See *The Times*, April 24, 1951, a letter from the chairman of the Advertising Bookmakers' Investigating Committee.

as possible in the open, and the provision of facilities on a commercial basis should be strictly controlled.

Against such a background, it would be unreasonable to expect many fundamental proposals for reform. Inevitably the present state of the law receives the harsh criticism it deserves (10, 23, 407), and proposals are made for its rationalisation and consolidation (457). The two outstanding proposals are probably those for the registration of bookmakers (253, 255, 258) and for licensed betting-shops (258, 263). The two are complementary, both being designed to enable better regulation of off-the-course cash betting. The registered bookmaker will be allowed to run such a business at his office without further licence, provided the people do not resort to his office for the purpose of making bets. He will also be allowed to run a betting-shop to which his clients may come in person to make bets. It is these betting-shops which are most likely to be abused, and they are therefore to be specially regulated. Each must be the subject of a specific licence, and the proposed conditions of operation are such as to limit their attractiveness. As one example of their austerity it is proposed to prohibit any seats for customers. In this way it is hoped to avoid the present scandals of street betting, and allow a legitimate outlet for small cash betting without, however, providing facilities which would encourage the habit. It must be confessed that since the practice seems both widespread and popular prohibition by law at this stage only brings the law into disrespect. Some change of the law is therefore inevitable and the present proposals appear reasonable and workable. To restrict such betting to surroundings similar to the awed hush of the average bank could do much to discourage the practice, and the proposed experiment appears to be one which is well worth making.

The same principles of recognising facts and minimising attractiveness again govern the proposed regulation of pool betting. It is proposed that all pool promoters must be registered bookmakers whose accounts would be subject to scrutiny (308-9, 315), and practices which tend to enhance the attractiveness of ' pools ' should be prohibited. Thus the practice of artificially increasing the winning ' dividends ' would become illegal (302) as would the abbreviated methods of submitting a large number of entries. Perhaps the most doubtful proposal is that which would limit the maximum prize within the range £10,000–£20,000. The Commission argues (181), perhaps somewhat speciously, that the danger of large winnings lies not in the winning but in the fact that the winners receive more money than they know how to handle properly. Yet it is conceived that, whatever its cause, the danger of suddenly acquiring a large sum is not proportionate to the sum. It is possible to behave just as foolishly with £20,000 as with £75,000, and though the foolishness may be of shorter duration its effects are just as disastrous. Moreover, it is obvious that the large prizes can

go to few, but if the maximum is limited it means that the spread of the winning money is greater and the chance of a substantial, if not extravagant, prize increased. It is therefore possible that this limitation would operate in the opposite way to that intended.

As to straight gaming, the proposal to abolish the uncertain distinction between games of skill and games of chance and substitute a prohibition of all games in which the chances of all the players (including the banker) are not equal is a welcome simplification. In this field what is really objectionable is the provision of gaming facilities on a commercial basis. It is therefore proposed (412) to make all gaming illegal where the promoter levies a toll on the stakes or makes a charge varying with the stakes, subject to minor exemptions aimed at making lawful the small and apparently irrepressible forms of gaming such as whist-drives which are now technically illegal. On the whole the proposed exemptions seem to be satisfactorily watertight, but the difficulties of definition in the new concept of an unlawful game are considerable and the possibilities of evasion as it stands seem real, and therefore do much to lessen the advantages of the reform. The concession for minor activities which are only considered to be gaming in a technical sense is another welcome *rapprochement* between law and life.

So far as 'automatic' gambling in funfairs and arcades is concerned there is the same difficulty that much is at present technically illegal (or possibly so) which is popularly regarded as innocent amusement. The proposals enable regulation by licensing, and are designed to preserve the pastimes and eliminate gambling attractions by limiting prizes and prohibiting machines which automatically deliver the prize. These proposals seem on the whole to be workable and effective, and the main discouragement to gaming will be found, in what is probably the best way, in making the provision of such facilities less attractive to the promoters.

Only the principal recommendations can here be noticed, there are others of significance, such as the alteration of the law so that daily dog racing should not be possible within what is in effect one region, but most of these matters fall within the principles already discussed. More noteworthy, however, are the two refusals to make positive recommendations, namely the rejection of a State lottery (392) and the refusal to make gaming transactions enforceable (455). The introduction of a State lottery would obviously cause a deep division of opinion and is therefore undesirable unless there are strong reasons for it. The strongest of those reasons goes if the finding of the Commission is accepted that the State is already making by way of taxation more out of the gaming industry than it would from a State lottery. On this matter the arguments of the Commission carry greater conviction than they do on enforceability. Many of the arguments advanced against holding such transactions enforceable apply equally to ordinary commercial transactions. On the other hand some of the arguments against

enforceability, such as difficulties of priorities, are not discussed, and it is evident that the bookmaking community would be likely to contract out were the law altered.[3] The balance of argument either way is slight and it may therefore be best to leave matters as they are. At least so doing will enable the lawyers to find out the precise scope of *Hill* v. *William Hill, Ltd.*[4] It is, however, to be hoped that in the consolidation of the law some of the inconsistencies which are pure matters of interpretation will be avoided : the distinction between wagers upon games and pastimes and ordinary wagers might be among them.

In this branch of law so much turns upon precise wording that it may be regretted that the Commission did not, as some of their predecessors have done, express their conclusions in draft legislative form. It is in that form that they can often only be judged to be practicable or not. Generally, however, the enactment of measures on the lines of the Report could, it seems, do nothing but good even on a short-term basis. Not least of the advantages which would flow from the system of registration would be that reasonably accurate information on the scope of gaming would be available. At present too much remains in the realm of speculation alone. The trouble with such Reports as this is then not so much that the man convinced against his will retains his old opinion but that he remains unconvinced. The opposed schools of thought are likely to continue their struggle in which the reasonable voice of the Commission is likely to be unheard. If therefore the traditional treatment of such Reports is the treatment it receives, it will be due to its merits and not its defects. In such matters the merit of balance may be dangerous, and it may be the misfortune of the Report that, though many will agree with it, few will get heated about it.

J. D. B. MITCHELL.

SECOND INTERIM REPORT OF THE COMMITTEE ON SUPREME COURT PRACTICE AND PROCEDURE (CMD. 8176/51)

THE Evershed Committee rightly remain faithful to their declared view that ' if the very difficult question of the cost of litigation is to be successfully tackled it must be approached and judged as a whole '. But as some further time must elapse before their Final Report can be presented with its ' decisions—possibly far-reaching in effect—upon matters of general principle ' they have published another Interim Report [1] upon certain points of detail not dependent on their conclusions on general principles and which might usefully

[3] *Appleson* v. *Littlewood* [1939] 1 All E.R. 464 and similar cases are some indication of this.
[4] [1949] A.C. 530.
[1] The First Interim Report was noted at Vol. 12, p. 483.

be implemented forthwith. In so doing, like skilful writers of serial stories, they take care to preserve the suspense and, indeed, to whet the appetite with hints of what may be to come; for example, 'It [*i.e.*, the Interim Report] is not concerned with and in no way pre-judges a subject which . . . is under active consideration, that is to say, the relation of . . . the Probate, Divorce and Admiralty Division to the Supreme Court as a whole'. Doubtless they are fully aware of the danger that the final instalment may prove an anti-climax unless it contains something which really is far-reaching.

As the Committee point out, their present recommendations are mainly of a highly technical nature, and they are therefore unsuitable for detailed consideration here. They relate, first, to procedure in Admiralty cases as regards which the most interesting suggestion is that a summons for directions should be introduced which would be in the nature of a 'pre-trial conference' before the judge who would have wide powers to admit written statements and to limit the introduction of expert evidence.

Secondly, they deal with various rules of practice in the Chancery Division; mainly a number of relatively non-controversial points raised by the Law Society. These include the widening of the scope of representation orders, and the simplification of the forms used in various types of action. The most important recommendation under this head relates to the introduction of a simplified procedure on construction summonses which might be used in relatively simple cases where the estate is small. The scheme would entitle the judge, if he thought fit, to make an order authorising the executors or trustees to distribute the estate on the basis of his decision made ex parte and without argument. The Committee point out that such a decision would not bind any interests not made parties, who would therefore be entitled, if they thought fit, to challenge the validity of the distribution by following the assets into the hands of the actual recipients. The scheme would nevertheless remove the present difficulty that trustees may be forced either to sacrifice caution or the estate. Moreover, it would enable parties who were sui juris to obtain the decision of a court very cheaply and then to bind themselves by adopting it in a Deed of Family Arrangement. This proposal is of general interest as a first step towards recognising that, if the prohibitive expense of litigation is to be reduced, English procedure must move away from its present contentious basis in the direction of a more inquisitorial system, such as prevails on the Continent, where everything is not left to the parties but the court (or its officials) makes its own investigations. The present step is a small one since the judge will still be presented with the facts and merely be expected to instruct himself on the law. In theory, therefore, it hardly represents a break with tradition, for at present the

judge, who is deemed to know the law, is merely 'reminded' by counsel and is always at liberty to carry out his own researches. Nevertheless, in practice it reveals a not inconsiderable change of outlook.

It is noted that the Committee do not seem yet to have given consideration to companies' winding-up and debenture-holders actions. These, it is suggested, are still unnecessarily wasteful and dilatory and the latter in particular all too often lend themselves to the bleeding of the assets for the benefit of the conducting solicitors and to unseemly disputes regarding the right to have the conduct of the action.

Thirdly, there is a recommendation that the jurisdiction of the Judge in Lunacy should be transferred from the lords justices to the judges of the Chancery Division. Few will doubt that this is right in principle, but the point is admittedly one of theoretical rather than practical importance since it is extremely rare for matters in the Court of Protection to be dealt with otherwise than by the Master.

The Committee fourthly recommend a widening of the discretionary power to refer matters to an Official Receiver. They also refer to the right of litigants by agreement to refer matters to a named Official Referee and they say that as this meets with the approval of litigants there seems no object in altering it, although they describe it as 'difficult to justify on a logical basis'. They presumably regard it as illogical because parties have no similar right to select their judges, but it might well be argued that it is the latter practice that is illogical. Parties can select their arbitrators; this is one of the attractions of arbitration and may partially account for the fact that large branches of practice (particularly in the commercial sphere) have been virtually removed from the original jurisdiction of the courts. Why should not parties to civil actions be allowed to select their judges? The introduction of such a right might have salutary effects as indicating to the aloof judiciary what the profession thought of their comparative merits, and might, in the past, have encouraged the retirement of those who took advantage of their irremovability to remain on the Bench after their faculties were no longer so keen as when they were appointed. There are, of course, practical difficulties to such a proposal except within narrow limits, but the logical objections are not apparent and, with proper safeguards to prevent the dislocation of business, it would be an interesting experiment. When counsel advise, as they sometimes do, that 'if this case is heard by Mr. Justice A we should win but if it comes before B we shall lose', litigants not unnaturally doubt the objectivity of English justice and the losing party feels resentment which might be avoided if, in the case quoted, he and his adversary could agree that it should be heard by C.

The final, and most important, set of recommendations relate to the Annual Practice and the Rules of the Supreme Court. The Committee state, and none will quarrel with them, that they 'are satisfied beyond doubt that the present condition of the Rules is highly unsatisfactory. . . . The case for general revision . . . is indeed so strong that we do not think it necessary to pursue it at length. . . . We accordingly recommend in the strongest terms that a complete revision of the Rules be immediately put in hand'. They add that although it would be wrong to fetter in any way the discretion of the draftsman 'we venture to suggest for his consideration the claims of general simplicity against over-particularity' (Parliamentary draftsmen please note). They also point out that the present muddle is made worse by the added complication of Practice Notes and Directions not all of which are effectively brought to the attention of the public and practitioners.

After 'the Herculean draftsman' has thoroughly cleaned out the Augean stables of existing Directions, Rules and Notes, and determined which should be preserved and in what form, the Committee recommend that henceforth, in addition to the White Book, the Rules and any Directions which should be made public should be published by the Stationery Office in loose-leaf form. Practitioners will doubtless still need the fully annotated White Book—the arrangement of which would doubtless be much improved—but, as the Committee point out, it is outrageous that no one (for example a foreign lawyer) can at present obtain a copy of our rules of procedure unless he is prepared to pay five and a half guineas for the *Annual Practice*, containing far more than he needs.

Lastly, the Committee deal with criticisms of the present Rules Committee. As has been repeatedly suggested in these columns, this body does not in practice keep the Rules in constant review and all too often remains quiescent until galvanised into activity by the recommendations of an ad hoc Departmental Committee. The Report rightly takes the view that the Rules Committee is on too high a level; 'it seems . . . that though impressive in point of distinction [it] is somewhat far removed from the workaday affairs of administration of the Rules'. Even after these have been re-drafted, they will need to be kept constantly under review to prevent 'an agglomeration of disparate growths'. The Committee therefore recommend the establishment of a 'Rules and Administration Committee' composed of those best acquainted with the practical working of the Rules who, as the Committee say, 'are the Masters (or their equivalent) . . . and junior counsel and managing clerks who frequent the Masters' Chambers rather than illustrious members of the Bar and Law Society who may be nominated . . . as qualified to keep company with the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President and the nominated judges'. To secure a body of the type required, the Committee suggest that its nucleus should be :

(a) a Chancery Master, a King's Bench Master and a Divorce Registrar, and (b) nominees of the Bar and Law Society chosen with regard to their practical experience of the working of the Rules. Our only criticism of this proposal is that if, as the Committee concede, it is managing clerks rather than solicitors, who have the requisite practical experience, it is for consideration whether the Solicitors' Managing Clerks Association should not nominate instead of, or in addition to, the Law Society.

In conclusion it may be pointed out that, as the quotations will have shown, the Report is delightfully written in a style that is in refreshing contrast with the usual 'officialese'. Perhaps its draftsman could be entrusted with the task of revising the White Book?

L. C. B. G.

NOTES OF CASES

Companies' Reduction of Capital

The practice of reducing capital is of growing popularity, not, as in days of depression, in order to wipe off losses, but, in days of nationalisation, cheap money, and profits tax on distributed profits, to slough capital surplus to immediate requirements. *Ex p. Westburn Sugar Refineries, Ltd.* [1951] 1 All E.R. 881 is therefore a case of some interest and importance.

Briefly, the facts were these: Company A had a share capital of 609,000 fully paid shares of £1 each and net assets of considerably greater value. It formed an investment holding company, Company B, and sold to it certain investments at the price shown as their value in Company A's books, the price to be satisfied by the allotment to Company A or its nominees of 2s. shares in Company B to the same total nominal value. Company A then resolved to reduce its capital by 2s. per share, this 2s. being satisfied by the transfer to the holder of each share of one 2s. share in Company B. Company A then petitioned the Court of Session for confirmation of the reduction under section 66 of the Companies Act, 1948.

The petition was unopposed, so that the court merely heard counsel for the Company and never had its attention drawn to all the possible objections to the scheme, which, as will be seen hereafter, reflected considerable credit on the ingenuity of the Company's legal advisers. In accordance with the rules, the petition was referred for report to a chartered accountant who said, in effect, that creditors were amply provided for, that the Company's assets were in excess of its requirements, and that the assets to be retained were more than sufficient to balance its liabilities (including share capital). On the other hand he drew attention to the fact that the true value of the shares in Company B was probably over three times their nominal value having regard to the true worth of the transferred investments.

It is obvious that the main purpose of the scheme was to 'hive off' as much as possible of the Company's assets so as to remove them from possible nationalisation. It is also apparent that the Company, in effect, proposed to reduce its assets by something over three times the reduction of its share capital and that to this extent it was indulging in a measure of 'stock-watering'. So much was clear to the Court of Session which, by a majority, refused to confirm the scheme on the grounds (a) that the Company had not shown by how much its assets were surplus to requirements and (b) that it was contrary to the public interest to enable a company to evade the possibility of future nationalisation.

On appeal the House of Lords unanimously overruled this decision and confirmed the reduction. As regards objection (a), they pointed out that the true question was not by how much the assets were surplus or what was the value of the assets returned to the members, but simply to determine the adequacy of the assets retained by the Company. As regards objection (b), they thought that the 'public' whose interests had to be protected was merely 'the investing public' (*per* Lord Normand at p. 884) or 'persons who may in the future have dealings with the Company or may be minded to invest in its securities' (*per* Lord Radcliffe at p. 887). Hence the possibility of future nationalisation was irrelevant.

If one accepts the narrow interpretation of public interest adopted by the House of Lords their arguments seem unanswerable. As they said, the only factor for consideration must then be the value of the assets retained by the Company and if these exceed the liabilities (including share capital) 'the investing public' can hardly be damnified. In fact, in the present case, there need not have been any reduction of share capital at all. It would have been the easiest thing in the world so to adjust the scheme that Company A realised a capital profit on the sale to Company B which it could have distributed (in cash or in kind) as a tax-free bonus to its shareholders leaving its original share capital intact. Why, one may ask, was this not done thus avoiding the necessity for any application to the court?

The answer, of course, is profits tax. Had the distribution been so handled, although the bonus would not have been liable to tax in the hands of the recipients, it would have been a distribution for the purpose of determining the Company's liability to profits tax at the higher rate (F.A., 1947, s. 35). By dealing with it as a reduction of capital the Company was able to avoid this, notwithstanding that it had in fact distributed more that the nominal amount of the reduction (*ib.* s. 36 proviso). It is in this that the full beauty of the scheme consists, but, not unnaturally, this aspect does not seem to have been displayed to the courts. Even if the learned law Lords had appreciated it, accepting the premiss on which they acted, it it difficult to see how it could have affected their decision; the effective avoidance of taxation is obviously beneficial, not detrimental, to the investing public as they defined it. But the Court of Session would clearly have regarded it as a relevant consideration. In the later case of *Re A. & D. Fraser, Ltd.* (*The Accountant*, April 28, 1951, p. 410) this court refused to sanction a reduction when the object was to avoid profits tax. That was a more bare-faced example in that the capital had been increased by a bonus issue and then immediately reduced, thus enabling what was in fact a dividend to be paid without liability for profits tax, but it is difficult to see how even this decision can stand in the light of the House of Lords' ruling.

The fact is, that there seems in this respect to be a fundamental difference in approach between the English Courts (including the House of Lords) and the Scottish. The former seem to treat their function as confirming authority as involving little more than checking that the statutory formalities have been complied with. As we have seen, they also pay lip-service to the principle that they must ensure that fairness is preserved as between creditors, shareholders present and future, and the various classes of shareholders, but, in practice, this latter control seems to be nominal rather than real. My colleague, Mr. G. B. Battersby, having analysed all the reported English cases on reduction of capital under what is now section 66,[1] is satisfied that in no case where the statutory formalities have been fully complied with has the court failed to confirm the reduction. Perhaps the most startling examples are the recent cases of *Scottish Insurance* v. *Wilsons & Clyde* [1949] A.C. 462 and *Prudential Assurance* v. *Chatterley-Whitfield Collieries* [1949] A.C. 512, where the House of Lords confirmed reductions under which objecting non-redeemable preference shareholders were paid off at par thus enabling the companies to get rid of preference capital carrying a higher rate of dividend than that now current.

The Scottish Courts, on the other hand, do seem to consider the whole merits and commercial morality of the reduction, and, as the *Fraser Case* shows, public policy generally. It may well be asked whether their attitude is not the more healthy. There is something distasteful in the solemn sanctioning by the courts of a tax evasion scheme,[2] and in approving it the courts seem to be acting in a manner contrary to the attitude which they now adopt towards tax-evasion in general.

Capital reductions for tax avoidance will doubtless become less common as a result of the new (1951) Finance Bill which contains two clauses on this point. The first (Clause 27) renders ineffective for profits tax avoidance, schemes such as that in the *Fraser Case* in which a bonus issue is followed by reduction or vice versa. But this clause would not have caught the method adopted by the Westburn Sugar Refineries. Whether Clause 28 would have done so is a more difficult question. This is the clause, which has aroused some opposition in the press,[3] providing quite generally that the Commissioners may disregard any transaction of which ' the main purpose or one of the main purposes ' is the avoidance or reduction

[1] As opposed to schemes of arrangement under the present s. 206 on which there have been a number of refusals and modifications.

[2] Admittedly the present scheme was a venial example, and it may well be argued that it did not really infringe either the letter or the spirit of the profits tax legislation since all the company did was to split up its undertaking leaving the total rights of the shareholders exactly the same as they were before.

[3] But not from me; see advocacy for just such a provision in 13 M.L.R. at p. 487. My only regret is that the draftsman instead of leaving well alone, has added various special examples in sub-section (2) under the formula ' without prejudice to the generality of the powers conferred by sub-section (1) '.

of liability to profits tax. It is submitted, however, that this too would not cover a scheme such as the present. The purpose of the company was not to avoid profits tax but to return surplus capital to the shareholders; avoidance of tax merely accounted for the method not for the arrangement itself. Moreover, it would be difficult to construe Clause 28 as extending to such a case in the light of Clause 27 which expressly deals with capital reduction: *expressio unius, exclusio alterius.*

It is therefore submitted that, unless the Finance Bill is suitably amended during its passage, the full advantages of the Westburn Company's scheme will still be available to others. This, perhaps, is a relatively minor matter. What is of greater importance is whether the English Courts in fact exercise their confirming power on sufficiently broad principles and whether their supervision is proving an adequate safeguard of either investors' interests or the public weal. The *Scottish Insurance* and *Chatterley-Whitfield Cases* certainly shook the City. And they had an immediate effect on the terms of issue of new preference shares; but the fact that subscribers to new issues are protected is small consolation to the holders of existing issues purchased at considerably above par and which may be paid off at par if the equity shareholders so resolve. The present decision is another illustration of what seems to be a tendency towards dangerous laxity in the exercise of the courts' control over companies.[4]

L. C. B. GOWER.

LITERAL INTERPRETATION OF STATUTES

IT is not our custom to comment on cases dealing with the details of the Rent Acts, but *Tinkham* v. *Perry* [1951] 1 All E.R. 249 deserves consideration as an example of the literal interpretation of statutes. The Rent Acts protect not only the tenant himself but also 'the widow of a tenant . . . who was residing with him at the time of his death, or, where a tenant . . . leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court'. L. was a tenant whose wife left him; the defendant was a woman who afterwards came to live with L. and who had two children by him. In this state of affairs L. died. The Court of Appeal without discussing the question whether the defendant could be said to be a member of L.'s family, held that in any event she was not protected, because L. had left a widow, albeit one who was not living with him at the time of his death. The court refused to read the words 'where a tenant leaves no widow' as meaning

[4] For other recent examples, see *Greenhalgh* v. *Arderne Cinemas* [1946] 1 All E.R. 512 and [1950] 2 All E.R. 1120; and *Re Press Caps, Ltd.* [1949] Ch. 434.

'leaves no widow such as mentioned before', *viz.*, a widow residing with him at the time of his death.

The decision is a striking reversion to a mode of construction that one had hoped might become obsolete after Denning L.J.'s remarks in *Seaford Court Estates, Ltd.* v. *Asher* [1949] 2 K.B. 481. The scheme of protection of the Rent Acts, when read literally, contained a hiatus that could never have been intended by the draftsman. Where the family is living amicably together, the Rent Acts protect the widow and through her the children. Where there is no widow they protect the children. Why should the children be refused protection merely because there is a widow who has not been living with her husband and who is not interested in the premises? To withdraw protection in these circumstances is absurd, and the 'golden rule' of construction allows statutory language to be modified to prevent an absurdity. Another rule of construction is that a section (and indeed an Act) must be read as a whole; so read, the word 'widow' where it occurred a second time could easily have been interpreted to mean a widow of the kind previously referred to. Independently of this, 'widow' could have been read as 'relevant widow', *i.e.*, a widow residing on the premises and claiming protection under the Acts. Such a mode of construction would certainly not be more violent than that by which 'single woman' in the Bastardy Acts has been held to include a married woman living apart from her husband.

G. L. W.

Vicarious Liability in Criminal Law

Barker v. *Levinson* [1950] 2 All E.R. 625
Ferguson v. *Weaving* [1951] 1 All E.R. 412
Reynolds v. *G. H. Austin & Sons, Ltd.*, [1951] 1 All E.R. 606

The application of the doctrine of vicarious liability in criminal law has figured prominently in several cases recently decided by the Divisional Court. Whatever views may reign in the field of tortious liability, it is clear that the present attitude of the Court is not to extend the recognised occasions when the maxim *respondeat superior* may be invoked to found criminal liability. Furthermore, there is discernible in some of the judgments a commendable adherence to the principle that in statutory offences, no less than in common law crimes, there is a presumption that *mens rea* is an essential ingredient. In the light of this presumption, the court's interpretation of such words as 'permitting', 'suffering', 'causing', 'supplying' and 'consuming'—commonly inserted in statutory offences—is of considerable importance. Of added interest is the discussion of the conditions which govern a charge of aiding

and abetting a person to do a criminal act. These being the principal points referred to by the Divisional Court it will be convenient to consider the above cases under the following headings:

1. *Aiding and Abetting*

In *Ferguson* v. *Weaving* an unsuccessful attempt was made to extend the principles of vicarious liability to a charge of aiding and abetting. The respondent, licensee of an hotel, was charged with aiding and abetting an offence under the Licensing Act, 1921, s. 4. The facts showed that customers had been served with intoxicating liquor before closing time but were found consuming it at twenty minutes past ten in the concert room of the hotel. If the waiters, employed by the respondent, had carried out their instructions all glasses, whether containing liquor or not, would have been collected by ten minutes past ten. This had not been done, but the licensee was unaware of the failure to carry out her instructions. Moreover, there was clear evidence that the licensee had done everything she could to ensure compliance with the requirements of the law.

The Court was concerned only with section 4, which prohibits:

(a) a licensee from *selling* or *supplying*, either by himself or his servants, intoxicating liquor outside permitted hours;

(b) the *consumption* of intoxicating liquor in licensed premises outside permitted hours.

It is to be observed that the section makes the act of *consuming* a substantive offence in the consumer only—it does not make it an offence for a licensee to suffer or permit the consumption of liquor after hours. Obviously, therefore, if a licensee is to be made liable at all for the consumption by customers outside hours, it must be as an aider and abettor, under the Summary Jurisdiction Act, 1848, s. 5.

In rejecting the appellant's argument that, since the licensee had delegated to the waiters the conduct and management of the concert room, their knowledge of the act of consuming should be attributed to the licensee, Lord Goddard C.J. had the following points to make:

(1) It is inappropriate to cite cases like *Cundy* v. *Le Cocq* (1884) 13 Q.B.D. 207, because there the substantive offence of *selling* liquor to a drunken person is committed by the licensee, the act of the servant being imputed to the licensee. It is clearly distinguishable from the present charge of *consuming*, where the substantive offence is that of the customer, not the licensee.

(2) If the statute had made it an offence for the licensee to *permit* or *suffer* the consumption after hours, it would be necessary to show that the licensee *knowingly* allowed the act of consuming. Assuming the licensee had delegated her duties to the

waiters, then in such a case their knowledge could be imputed to the licensee so as to make her liable as a principal offender : see *Linnett* v. *Metropolitan Police Commissioner* [1946] 1 All E.R. 380.

(3) In fact, the licensee was charged with aiding and abetting the substantive offence of consuming by a customer, and to incur liability it is necessary to prove *personal* knowledge in the licensee of the act complained of. The knowledge of the waiters cannot be imputed to the licensee so as to make her, not a principal offender, but an aider and abettor.

So much then is clear, *viz.*, that 'before a person can be convicted of aiding and abetting the commission of an offence, he must at least know the essential matters which constitute the offence'. This principle has been reiterated on several occasions recently, *e.g.*, in *Johnson* v. *Youden* [1950] 1 All E.R. 300 and in *Ackroyd's Air Travel, Ltd.* v. *D.P.P.* [1950] 1 All E.R. 933. It was also stressed in *Thomas* v. *Lindop* [1950] 1 All E.R. 966, a case identical in all respects with *Ferguson* v. *Weaving* but which, surprisingly, does not appear to have been referred to by either counsel or the court in the latter case. It is satisfactory to note, however, that judgment along similar lines was delivered in both cases by Lord Goddard C.J.

In addition to personal knowledge, to sustain a charge of aiding and abetting, certain other essentials are necessary. In the words of Avory J. in *R.* v. *Betts and Ridley* (1930) 22 Cr. App.R. 148, it must be shown that the accused 'with the intention of giving assistance, is near enough to afford it should occasion arise'. These concurrent conditions also have been the subject of recent judicial comment. The Divisional Court in *Wilcox* v. *Jeffery* [1951] 1 All E.R. 464, emphasised that physical presence in itself is not enough, and cited with approval the words of Cave J. in *R.* v. *Coney* (1882) 8 Q.B.D. 534, at p. 540, in which he said : 'Where presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is prima facie not accidental it is evidence, but no more than evidence for the jury'. In addition to presence, which may be either actual or constructive, there must be an intent to give assistance evidenced, in the words of Lord Goddard, by the accused 'taking part, concurring or encouraging' the principal offender ([1951] 1 All E.R., at p. 466).

The distinction between the technical expressions 'aid and abet' and 'counsel and procure' was adverted to in *Ferguson* v. *Weaving*, the Court leaving open for future consideration the question whether the words 'counsel and procure' when used alone require proof of something more than would establish a case of being an accessory before the fact in the case of felony. Both expressions appear in the Summary Jurisdiction Act, 1848, s. 5, and in the Accessories and Abettors Act, 1861, s. 8, which provisions may well have been present in the mind of the Court when

posing this question. Taking first the Act of 1848, the wording of section 5[1] indicates that it applies equally to summary offences and to indictable offences which are tried summarily. That being so, it would seem strange if the words 'counsel and procure' were intended to have a different meaning according to whether the offence before the magistrates' court were a summary or indictable offence. Additional force is lent to this view by the interpretation placed upon the word 'misdemeanour' in the Accessories and Abettors Act, 1861, s. 8.[2] In *Benford* v. *Sims* [1898] 2 Q.B. 641, it was said to include all offences less than felony, *i.e.*, summary offences as well as misdemeanours tried on indictment, and this interpretation was approved in *Du Cros* v. *Lambourne* [1907] 1 K.B. 40. Lord Alverstone C.J., in the latter case, stated that the words of section 8 were merely declaratory of the common law and cited Blackstone's definition of an accessory before the fact which is based on the words 'counsel and procure'.[3] Unless an additional element of inconsistency is to be introduced into the criminal law it is suggested that whether the offence be a felony, indictable misdemeanour or a summary offence, the use of the expression 'counsel and procure' requires proof only of such conduct as would establish a case of being an accessory before the fact.

2. *Vicarious Liability*

The intrusion of the doctrine of vicarious liability into criminal law has long been viewed with considerable misgiving. Perusal of the judgments recently delivered in the Divisional Court indicate an awareness of the danger inherent in any extension of such a wide principle of criminal liability. In *Reynolds* v. *G. H. Austin & Sons, Ltd.*, Devlin J. voiced a welcome word of warning when he said (at p. 612): 'I think it a safe general principle to follow . . . that where the punishment of an individual will not promote the observance of the law either by that individual or by others whose conduct he may reasonably be expected to influence, then, in the absence of clear and express words, such punishment is not intended'.

Where the terms of a statutory offence are construed as (1) absolutely prohibiting a certain act, or (2) requiring *mens rea* in the form of, *e.g.*, knowingly doing or suffering or permitting some act, it is permissible, solely on the grounds of public interest,

[1] It reads: 'Every person who shall aid, abet, counsel or procure the commission of *any offence . . . punishable on summary conviction* shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction'.

[2] It reads: 'Whosoever shall aid, abet, counsel or procure the commission of *any misdemeanour whether the same be a misdemeanour at common law or by virtue of an Act* . . . shall be liable to be tried, indicted and punished as a principal offender'.

[3] The full definition is 'one who being absent at the time of the crime committed, doth yet procure, counsel or command another to commit a crime' (*Commentaries*, iv, 36).

to invoke the doctrine of vicarious liability. The reason is, as Devlin J. explained, that by such sanctions citizens are induced to keep themselves and their organisations up to the mark. It is, however, important to determine the limits of this convenient but troublesome doctrine. In *Reynolds* v. *Austin*, Humphreys J. expressed the opinion that the rule 'does not extend to the case of a defendant charged with having done an act lawful in itself but which had become unlawful as the result of some action entirely unknown to him by some person not his servant or agent'. Lord Goddard C.J. was equally emphatic in stating that hitherto the doctrine of vicarious liability 'has never been applied, as far as I know, to a case where the prohibited act is not that of the defendant, but that of some person over whom he had no control and for whom he had no responsibility.

Such a principle is both clear and acceptable. Its value would have been enhanced had the attention of the Court been drawn to, and an attempt made at explaining away, the decision of a strong Divisional Court in *Parker* v. *Alder* [1899] 1 Q.B. 20, in which an innocent milk vendor was convicted under the Food and Drugs Act, 1875, s. 6,[4] for selling milk adulterated in the course of transit by *some person unknown*. In that case Wills J. declared: 'There is, as it seems to me, no material distinction between a case of adulteration by a servant without the authority, and against the express orders of his master, and adulteration by the fraudulent act of a stranger'. The same view was expressed by Lord Russell of Killowen C.J. the other member of the court. Clearly during the fifty years that have elapsed since *Parker* v. *Alder* was decided there has been a shift in the judicial attitude towards the principle of vicarious liability. Is it too much to expect that a firm stand will be made against any reversion to the rule as applied in *Parker* v. *Alder*?

Another unsatisfactory feature of the recent decisions is the adoption by the Court, in *Barker* v. *Levinson*, of the tort formula 'within the general scope of the servant's employment' as marking the boundaries of a master's vicarious liability for the crimes of his servant. In that case the offence charged, under the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1) which prohibits the requiring of a premium as a condition of the grant of a tenancy, was construed as one of absolute prohibition. Such an illegal premium had been collected by P. a rent-collector employed by L., the manager of a block of flats. It was found by the justices that the authority delegated to P. was limited to satisfying himself as to the suitability of a prospective tenant and that P. had no authority to negotiate the terms of the tenancy. On that finding of fact the Court held that P. in requiring the illegal premium,

[4] This offence is now contained in the Food and Drugs Act, 1938, s. 3 (1). In *Lamb* v. *Sunderland and District Creamery, Ltd.* [1951] 1 All E.R. 923 the offence was construed by the Divisional Court as one of absolute prohibition.

was not acting 'within the general scope of his employment' and, therefore, L. was not criminally liable. When it is realised that the principle of vicarious liability in criminal law is not dependent on the relationship of master and servant, it is suggested that the introduction of such a test, peculiar to master and servant cases, is likely to confuse the issue and should be discarded. In its place there already exists the wider and comprehensive test referred to in *Linnett* v. *Metropolitan Police Commissioner* [1946] 1 All E.R. at p. 382 where it was said that the principle of vicarious liability 'depends on the fact that the person who is responsible in law . . . has chosen to delegate his duties, powers and authority to somebody else'.

It is agreed that if this test is applied to the facts in *Barker* v. *Levinson*, the result is the same as that reached by the Divisional Court. In comparison with the tort formula, however, it has the following advantages: it is of general not limited application; it avoids the difficulties, experienced in the law of tort, of deciding the scope of a servant's employment; and it has proved itself to be sound in conception and in practice.

What of the actual decision in *Reynolds* v. *Austin*? Little can the Stone Women's Guild have imagined that their coach trip to Skegness last summer would later have engaged the attention of the Divisional Court, but then the Women's Guild can scarcely have heard of section 72 (1) and (10) of the Road Traffic Act, 1930, which makes it an offence for any person to *use* a vehicle or *cause* or *permit* it to be used as an express carriage except under a road service licence. It is permissible to use an 'express carriage'—defined in section 61 (1) (*b*) of the same Act as 'a vehicle which carries passengers for hire or reward at separate fares'—without a licence but only 'on a special occasion'. To fall within the latter description certain conditions have to be fulfilled, amongst which is the following: 'the journey must be made without previous advertisement to the public of the arrangements therefor'. Although no advertisement had been published by the omnibus company, the Women's Guild, without any knowledge on the part of the bus company, had inserted such an advertisement in a shop window in view of the public. The contention that in such circumstances the omnibus company was liable for a breach of section 72 (10) was rejected by the Court on the express ground that the prohibited act, *i.e.*, the public advertisement, was not that of the omnibus company but of some person over whom the company had no control and for whom it had no responsibility. This ruling, though in direct conflict with that given in *Parker* v. *Alder*, is in accord with the test stated in *Linnett* v. *Metropolitan Police Commissioner* and is, it is suggested, an eminently sound one. Whereas the particular offence in *Reynolds* v. *Austin* was construed as requiring *mens rea* in the form of knowledge, it must be realised that had the offence been construed as one of absolute

prohibition no difference in the application of the principle of vicarious liability would have resulted.

3. *Mens Rea in Statutory Offences*

Finally, it is to be noticed that in *Reynolds* v. *Austin* Devlin J. ranged himself on the side of those who are old fashioned enough to hold the view that there is still a presumption in modern statutory offences that *mens rea* is an essential ingredient. The learned judge referred with approval to that great master of the common law, Wright J.'s exposition in *Sherras* v. *de Rutzen* [1895] 1 Q.B. 918, in which he acknowledged the possibility of such presumption being displaced 'either by the words of the statute creating the offence or by the subject-matter with which it dealt'. In the last twenty years or so there has been apparent a tendency, on the part of some judges, too readily to displace the fundamental maxim of criminal liability. It is so easy to fall into the state of mind where the general public interest is regarded as overriding any considerations designed to protect the accused. Where the intention of the legislature is uncertain one looks to the judiciary to exercise a proper sense of balance between the public good and the protection of the individual. In the cases under discussion this guiding principle has not been overlooked.

Thus, in *Reynolds* v. *Austin* the Divisional Court were unanimous in construing the words '*using*, *causing* or *permitting*' as all requiring proof of *mens rea* in the form of knowingly doing or allowing the prohibited act.[5] An attempt to isolate the word 'using' from the rest of the section was unsuccessful—to do so, said Lord Goddard, would be to reduce the law to an absurdity. Similarly, in *Ferguson* v. *Weaving* it was pointed out that where a statutory offence prohibits the '*suffering*' of an offence, guilty knowledge must be shown for, as was said in *Somerset* v. *Hart* (1884) 12 Q.B.D. 360, at p. 362: 'How can a man suffer a thing to be done when he does not know of it?'.

Absolute prohibition or proof of *mens rea*—there lies the constant battle before the courts. Whereas it remains true to say that the answer in each case depends on the interpretation of the particular statutory provision, it is to be hoped that any court, with a conscious or unconscious inclination towards a severe line of construction, will consider carefully whether the infliction of punishment upon a person without a guilty intent will help to promote the observance of the law.

J. Ll. J. Edwards.

[5] Cf. *Laird* v. *Dobell* [1906] 1 K.B. 131, where the Divisional Court, having to construe the Fertilizers and Feeding Stuffs Act, 1893, s. 3 (1) (*b*), in which the same words 'causing or permitting' appear, held that *mens rea* was *not* a constituent element of that particular offence. The court purported to follow the earlier decision in *Korben* v. *West Sussex C.C.* (1903) 72 L.J.K.B. 514, where Channell J. alone, in a dissenting judgment, was of opinion that these particular words indicated the necessity for *mens rea*.

When a Wife May Testify

At the Manchester Assizes on March 1 of this year a man was indicted [1] under section 16 of the Offences Against the Person Act, 1861, for maliciously sending to his wife a letter threatening to murder her. Gorman J. held that the wife was not a competent witness for the prosecution either under the Criminal Evidence Act, 1898, or at common law as in a case where the husband is indicted for personal injury to her, and since no other evidence was offered the charge was dismissed.

The first ground of the decision appears incontrovertible. Section 16 of the Offences Against the Person Act is not included in the Schedule to the 1898 Act and as far as statutory competence is concerned, that would seem to dispose of the matter. The same can, however, hardly be said of the decision as regards the wife's competence at common law—a decision based on a statement in the thirty-second edition of *Archbold's Criminal Pleading, Evidence and Practice*, and 'the fact that there was no authority for saying that a threat to murder was a "personal injury" to the wife'.

The seventh edition of *Hawkins' Pleas of the Crown* [2] says that a wife may demand a surety of the peace against her husband threatening to beat her outrageously and that a husband also may have it against his wife. The eighth edition [3] repeats this on the grounds of evident necessity and quotes *R.* v. *Mary Meed*.[4] The statement appears never since to have been controverted and in *D.P.P.* v. *Blady*,[5] Lush J. affirmed that 'the ordinary case in which the question arose was where the husband used or threatened to use, violence against her. If he threatened it, she could exhibit articles of the peace against him: if he used it, she could give evidence of the offence. The rule was not confined to actual assaults'.

It therefore seems clear that if in the case under discussion the wife had applied to have her husband bound over to keep the peace, she could have given evidence for the prosecution against him, but because her evidence was proffered on indictment under a statute it was rejected. But this is to take a distinction not on the nature of the offence but on the form of the charge, whereas the wife's competence as a witness against her husband at common law was always based on the nature of the offence and the difficulty of proof if her evidence were rejected. Surely the form in which the charge is brought cannot affect the admissibility of such evidence. It is a strange thought that in the days when a husband's right to beat his wife 'in moderation' was scarcely challenged, she could give evidence if he threatened to beat her

[1] *R.* v. *Yeo* [1951] 1 All E.R. 864.
[2] Published 1795, Bk. 1, Ch. 60, s. 4.
[3] Published 1824, Bk. 2, Ch. 46, s. 77.
[4] 1 Burr. 542.
[5] [1912] 2 K.B. 89, at p. 92.

'outrageously', whereas 150 years later, when a husband's dominion over his wife has become at the lowest somewhat circumscribed, she is unable to give evidence when he threatens to murder her.

It also seems clear that actual violence by the husband is not essential to the admissibility of the wife's evidence. There is, for example, venerable authority for holding that a wife is a competent witness in cases of attempted violence. In *R.* v. *Jagger*[6] twelve judges decided that a wife was competent to prove the fact that the husband had given her cake in which arsenic had been introduced. In *Lord Audley's Case* in 1631[7] a wife was held a competent witness in a charge that the husband assisted in a rape upon her by another.

The decision in *R.* v. *Yeo* contrasts strongly with the robustness of the older decisions. Thus in *Lord Audley's Case* it was held[8] that 'in civil cases the wife may not [give such evidence] but when the wife is the party grieved, and on whom the crime is committed, she is to be admitted as witness against her husband'. In *R.* v. *Jagger*, Holroyd J. said the wife could only be admitted to prove facts which could not be proved by any other witnesses. In *R.* v. *Wakefield*,[9] Hollock B., giving judgment on the question of the wife's competence in forcible marriage, said: 'A wife is competent against her husband in all cases affecting her liberty and person. This was decided in *Lord Audley's Case* . . . but it has since been established by a long series of cases that she may prosecute, exhibit articles of the peace, etc. It would be unreasonable to exclude the only person capable of giving evidence in certain cases of injury; our law recognises witnesses *ex necessitate*; and it would be strange, indeed, that the husband should be allowed to exercise every atrocity against the wife, and her evidence not to be admitted'. But what seemed strange indeed in 1827 was held to be a rule of the common law in 1951. It can hardly be doubted that the wife's evidence in *R.* v. *Yeo*, would have been admissible within the terms of each of the above judgments. Indeed it is difficult to conceive of a stronger case of a wife as witness *ex necessitate* than under section 16 of the Offences Against the Person Act, which reads 'Whosoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person. . .'.

Except in the rare case where the accused entrusts the letter or writing to another person for transmission the evidence of the recipient that the letter was addressed to and received by him or

[6] Yorkshire Assizes, 1797, cited by H. Cohen in his essay on Spouse Witnesses in Criminal Law, p. 29.
[7] 13 State Trials 402.
[8] *Ibid.*, at p. 414
[9] 2 Lewin C.C. 279, at p. 287.

her must be received to prove an essential ingredient of this offence. If the courts are to refuse the wife's evidence until the threat is carried out, she will then be incompetent to testify under any law. In *D.P.P.* v. *Blady*,[10] the only modern case which I have been able to trace bearing on the question, the Court of Criminal Appeal held that a wife was not a competent witness against her husband where he was charged with knowingly living wholly or in part on the earnings of prostitution, in this case the prostitution of the wife, on the grounds that the wife was competent only when the offence charged was directed against her. Lush J. dissented on the grounds that until the evidence of the wife was heard it was impossible to decide whether an offence had been committed against her person. Pickford J.[11] here limited the exceptions in which the wife is a competent witness to 'cases in which the offence itself concerned the liberty, health or person of the wife', while Avory J.[12] said that husband or wife was a competent witness 'on any charge which affects his or her liberty or person'. Can there be any doubt that even on these restricted views of the wife's competence, a letter threatening to murder her is an offence which concerns or affects the wife's person?

The authorities are admittedly scanty and those on the exact point raised in *R.* v. *Yeo* non-existent, but that is hardly surprising. A man who threatens to murder his wife will rarely choose to do so by correspondence.

It is frequently alleged that the English law of evidence is archaic and should be brought into line with modern conditions by legislation. Such arguments can only be strengthened by decisions like that in *R.* v. *Yeo*, in which the spirit and essential foundations of common law rules are ignored in favour of the *ipsissima verba* of practitioners' digests of the law, while the absence of direct authority is treated as an encouragement to view development negatively. It is to be hoped that the decision may soon be replaced by one showing a more positive and realistic approach to the problem of a wife's testimony for her own protection.

O. M. STONE.

SHIPPING—PLAINTIFF A WRONGDOER—UNITY OF THE CROWN

IN deference to authority the Court of Appeal in *The Susan V. Luckenbach* [1951] 1 All E.R. 753, had to ignore the legal principle that a man is not to be allowed to take advantage of his own wrong; but the outcome was not a happy one. The facts were that ships A and B were in the same ownership (that of the Crown); B collided with C through the negligence of B, and, C being

[10] See n. 5, *supra*.
[11] At p. 90.
[12] At p. 91.

damaged, A rendered salvage services to her. In an action for damages by C against B, B limited her liability. A now sued C for salvage. It was held that C was liable, notwithstanding the common ownership of A and B, and the fact that owing to the limitation of B's liability C could not pass the burden of the salvage award back to the common owner through the liability of B.

The case is an illustration of the imperfect state of the present law relating to the limitation of liability under the Merchant Shipping Acts. Normally a wrongdoer has an incentive to help his victim after the accident, because by so doing he reduces the damages that he has to bear. But in a maritime case where the defendant limits his liability, he has no such incentive to assist the victim to reduce the victim's damages within the range of irrecoverable damages. The wrongdoer's activity in this regard may benefit the victim but will not reduce his own liability. Consequently there may be something to be said for giving him a right to salvage, and this whether the salvage services are rendered by the vessel responsible for the collision or by a different vessel in the same ownership. But it would surely be much better to take away the limitation of liability to the extent that damage is aggravated through negligent failure to salvage, and correlatively to take away the right to reward for salvage services.

At the end of the judgment there is a curious remark that 'it may be that, if different departments of the crown are concerned, it would be right that they should not be treated as identical parties', where they are different authorised departments under the Crown Proceedings Act. This observation was made with respect to the principle of circuity of action, and actually no question of circuity of action arose because the defendants were not entitled to recover an indemnity in respect of the salvage award from the Crown, for the reason already stated. Had the question of circuity of action arisen, it might have been settled by analogy to the rule under the Crown Proceedings Act whereby a defendant when sued by the Crown cannot (without the leave of the court or a judge) avail himself of any set-off or counterclaim if either (*a*) the subject-matter of the set-off or counterclaim does not relate to the Government department in the name of which the proceedings are brought, or (*b*) the proceedings are brought in the name of the Attorney-General. There was no need for the court to suggest generally that different Government departments should be treated as different parties, and such a rule would be contrary to the doctrine of the unity of the Crown, as reaffirmed for example in *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227.

The question may be important under the Contributory Negligence Act. Thus if a collision occurs between a war office lorry, an air ministry van and a private car, owing to the fault of the lorry and the car, and the Crown sues the driver of the car for damage to the van, it is submitted that the contributory negligence

of the Crown through its servant, the driver of the lorry, would operate to reduce damages, notwithstanding that different departments are concerned.

G. L. W.

Negligent Misstatements—Liability in Tort?

In *Candler* v. *Crane Christmas & Co.*[1] the Court of Appeal (Asquith L.J. and Cohen L.J., Denning L.J. dissenting) dismissed an appeal by the plaintiff from a decision of Lloyd Jacob J. rejecting his claim for damages arising from a negligent statement by the defendants. On the instructions of the managing director of a company the defendant firm of accountants prepared the draft accounts and balance sheet of the company, which to the knowledge of the defendants were intended to be put before the plaintiff to induce him to invest money in the company. The accounts were negligently drawn up and presented an untrue view of its affairs. The plaintiff invested £2,000 in shares of the company, acting in reliance on these accounts, and soon lost this sum when the company was wound up. Failure to use due care was admitted by the defendants, but the trial judge held that the defendants owed no duty to the plaintiff to use due care. On appeal the defendants argued that in the absence of fraud no duty to take care in making statements arose except that arising out of a contractual or fiduciary relationship, and that a duty to take care subsisted only when physical damage to persons or to property was caused by a failure to take care.

Although Asquith L.J. admitted[2] that *Derry* v. *Peek*[3] is 'primarily . . . a decision on the meaning of the word "fraud" and is, therefore, not directly relevant to the main issues in the present case' he said that it implied that directors were not liable to shareholders for negligent misrepresentations, and was not affected by *Donoghue* v. *Stevenson*.[4] He found that *Le Lievre* v. *Gould*[5] was an authority binding on him for the proposition that there was no liability for negligent misstatements, and that Lord Atkin in *Donoghue* v. *Stevenson* had not intended to cast doubts on that case. He further held that *Donoghue* v. *Stevenson* did not logically invalidate it because the principles of negligence there laid down serve only to protect physical damage to persons or to property, not invasions of pecuniary interests. He could not agree that the wide 'neighbour' rule of negligence enunciated by Lord Atkin was approved by a majority of the House of Lords in that case.

1 [1951] 1 All E.R. 426.
2 At 437.
3 (1889) 14 App.Cas. 337.
4 [1932] A.C. 562.
5 [1893] 1 Q. B. 491.

Cohen L.J. held that *Le Lievre* v. *Gould* was good law and 'directly in point'[6] here. He further stated that Cardozo J. had reached a similar conclusion in the American case, *Ultramares Corporation* v. *Touche*.[7]

The dislike of the Bar[8] for *Derry* v. *Peek* and the 'tendency to assume that it was intended to mean more than it did'[9] are well known. In that case deceit only and not negligence was pleaded, and it is difficult to see how it can in any way prevent the courts from extending the tort of negligence to misrepresentations.

Denning L.J. seems justified in his view that even though *Le Lievre* v. *Gould* was rightly decided it is readily distinguished from the instant case. In *Le Lievre* v. *Gould* the defendant who prepared the negligent valuation of work done in building construction did so before the mortgage deed providing for advances by the plaintiff to the extent of work done was drawn up. He acted solely on the instructions of the landowner who produced to him an agreement whereby the landowner was to secure the advancement to the builder of payments in accordance with the progress of the work. The defendant did not know of the mortgagee when he prepared the valuation[10] and 'he was not aware of the contents of the mortgage deed'.[11] In the present case, on the other hand, the defendants prepared the accounts expressly for the purpose of the plaintiff using them. It is true that the Court of Appeal in *Le Lievre* v. *Gould* overruled *Cann* v. *Willson*,[12] the facts of which did closely correspond to those in the present case, and in which it was held that there was a liability for a negligent misrepresentation. It is submitted that the overruling of *Cann* v. *Willson* was unnecessary to the decision in *Le Lievre* v. *Gould*.

What is the effect of *Donoghue* v. *Stevenson*? The assertion that only the narrower of its two definitions of negligence is part of English law, and that the narrower duty does not extend to pecuniary interests is surely debatable. It is conceded that the courts have been reluctant to extend the duty of care beyond physical damage, but the House of Lords in *Morrison Steamship Co., Ltd.* v. *Greystoke Castle* (*Cargo Owners*)[13] has recently expressly rejected the argument that 'liability or damage arising from a contract with a third party gives no ground for a claim for damages in an action against a wrongdoer unless the liability or damage arose from physical injury to the plaintiff's person or to property owned by, or in the possession of, the plaintiff'.[14]

[6] At 445.
[7] (1931) 255 N.Y. 170.
[8] Pollock-Holmes, *Letters*, Vol. 1, at 215.
[9] *Nocton* v. *Ashburton* [1914] A.C. 937 at 947 (*per* Viscount Haldane L.C.).
[10] See the report of the case at first instance (1892) 9 L.T. 19.
[11] At 493.
[12] (1888) 39 Ch.D. 39.
[13] [1947] A.C. 265.
[14] At 275 and 280 (*per* Lord Roche).

It is pleasing that Cohen L.J. should cite a United States authority (and on the suggestion of Professor Goodhart). But it is unfortunate that he should give the impression that the American courts would deny a remedy in cases similar to the *Candler Case*.

On the contrary : the *Ultramares* decision turned on two points; that the service was not rendered primarily for the plaintiff's benefit, and that there was no contemplation of reliance by the specific plaintiff.[15] So Prosser states the law as follows[16]:

> 'When the representation is made directly to the plaintiff, in the course of his dealings with the defendant, or is repeated to him with knowledge that he intends to rely upon it, there has been no difficulty in discovering a duty of reasonable care; and the same duty has been found where it is made to a third person with knowledge that he intends to communicate it to the specific individual plaintiff for the purpose of inducing him to act'.

It seems then that the United States would afford a remedy in facts similar to the *Candler Case*. There seems nothing to stop the English courts from saying, with Denning L.J., that accountants owe a duty where they 'know that the accounts were required for submission to the plaintiff and use by him . . . in respect of the very transaction in mind at the time'.[17]

Those last words are important. The reluctance of the courts to declare a liability for negligent mistakes seems to arise from a fear that liabilities of great and unknown extent and quite disproportionate to the fault involved would otherwise be incurred by accountants, cartographers and others. If a specific relationship between plaintiff and defendant is insisted on, so that the plaintiff can recover only where he was particularly exposed to a risk of pecuniary loss by the defendant's carelessness, then this fear is without foundation. It is submitted with respect that the views of Denning L.J. and of the American courts are good law and good sense.

H. STREET.

TWO HIGHWAY ACCIDENTS

Two recent cases illustrate strikingly the different approaches taken by the law of torts of two types of highway accidents. In the first a landowner was held liable on account of a nuisance to the highway due to the defective state of demised premises, even though he had undertaken no duty to repair and had not expressly reserved any right to enter and repair. In the second the owner of tame animals which had escaped onto the highway was held not

[15] See W. Seavey, 'Mr. Justice Cardozo and the Law of Torts' in 52 Harvard L.R. (1938) 372 at 400, and Harper, *Law of Torts* (1933), § 76.

[16] *Torts* (1941) 736–7. Footnotes omitted.

[17] At 434–5.

liable even though he might by exercise of reasonable care have prevented such escape.

The first case is *Mint* v. *Good* [1950] 2 All E.R. 1159. It would be futile now to deny that the landlord's liability in such cases has increased considerably in strictness. Thus in *Wringe* v. *Cohen* [1940] 1 K.B. 229, it was held that where the landlord had convenanted to do repairs he was liable for a nuisance due to want of repair whether he knew, or ought to have known, of the danger or not. This principle was extended in *Heap* v. *Ind Coope & Allsopp* [1940] 2 K.B. 476 to a case where the landlord had merely reserved a right to enter and do repairs. *Wringe* v. *Cohen* may justly be regarded as the starting-point of the movement to increase the stringency of the landlord's liability. Whether the wide proposition there enunciated was necessary to the decision of that case is a matter of some doubt. It appears that in *Wringe* v. *Cohen* the defect had been present for some three years. The lease appears only to have been some two years old. (In the report it is stated at p. 229 that the defendant 'had let his premises to a tenant who had *occupied* them for two years'. Nothing is said in terms about the date of the lease, but it seems a fair assumption to make that the lease did not precede the tenant's going into possession by as much as a year.) Hence it appears that the defendant had leased the premises with a defect on them. In these circumstances it has long been settled that a lessor is liable. (*Roswell* v. *Prior* (1701) 12 Mod. 635: 'It shall not be in his power to discharge himself by granting it over' (at p. 639); *Todd* v. *Flight* (1860) 9 C.B. (N.S.) 377.) *Gandy* v. *Jubber* (1865) 5 B. & S. 78 decided that the knowledge of the landlord was not an essential of liability in these cases. These cases therefore lay down clearly that where a landlord *has let* premises in a state of disrepair he is liable for a nuisance arising from this disrepair whether he knew of it or not. *Wringe* v. *Cohen*, though much criticised, is undoubtedly a correct decision in view of this line of authorities.

At the same time it must be admitted that the wider principle laid down in *Wringe* v. *Cohen* has considerably influenced the development of the law. It is on the wider reasoning in *Wringe* v. *Cohen* that *Heap* v. *Ind Coope & Allsopp* is based, for in that case it appears that the defect arose after the execution of the lease. On the other hand in one respect *Heap's Case* is narrower than *Wringe* v. *Cohen*, for in the former case it was merely decided that the landlord was liable in respect of a defect of which he did not know—not in respect of one of which he was under no duty to know. Indeed it is doubtful how far the wider proposition in *Wringe* v. *Cohen* can go.[1] It seems strange to assert in one breath

[1] Taken literally this proposition leads to the following curious result: B is coming to visit A on business common to both of them. While B is standing outside A's house in the street a window collapses onto him owing to want of repair of which A neither knew or ought to have known. A is liable according

that a man is under no duty to know of a danger and yet that he is liable for it. Perhaps all that the wide proposition in *Wringe* v. *Cohen* means is that by virtue of his covenant to repair the landlord *is* under a duty to know of all dangers save those due to a secret and unobservable operation of nature and those due to the act of a trespasser. The distinction between a danger due to want of repair and one due to a secret and unobservable operation of nature might well be a fine one.

Such, then, was the state of the authorities when *Mint* v. *Good* came before the Court of Appeal. In this case L. had let premises to T. under an oral weekly tenancy agreement which contained no express provision as to repairs, and by which L. reserved no express right to enter and do repairs. Owing to disrepair a defective wall collapsed onto the infant plaintiff in the highway. This defect could have been ascertained by reasonable inspection. L. had in fact been doing the repairs. It was held that in an agreement of this kind a term must necessarily be implied that the landlord should have a right to enter and do repairs, that the defect was one of which L. should have known, and that therefore he was liable. The actual ratio of the case is thus a very narrow one, and viewed on this basis the case decides no more than *Heap* v. *Ind Coope and Allsopp*. The precise reasoning employed to imply a term in the lease may not always be convincing. But it is not the purpose of this note to dispute the expediency or justice of implying such a term in tenancies of this nature. The main interest of *Mint* v. *Good* centres in the judgment of Denning L.J. which is based largely on the wider ground that the protection of the highway user at the expense of the landowner is the paramount purpose of the courts. The liability of the landowner is based on the fact that the courts have realistically realised that he usually does structural repairs and that he rather than the tenant can afford to pay damages. This may be generally if not always true, but it is difficult to see how the landlord's financial position can affect his liability in tort. But Denning L.J. goes even further than this. He doubts whether a landlord can escape liability by taking a covenant to repair from his tenant. 'The liability of the owner is liability in tort and cannot be affected by the terms of his contract with the tenant' (at p. 1166). Hence Denning L.J. doubts whether *Pretty* v. *Bickmore* (1873) 8 C.P. 401 is still good law. The doubt on this

to *Wringe* v. *Cohen*. But if the window collapses onto B while he is standing on A's doorstep, A and B are in the relationship of invitor and invitee, and A is not liable under the rule in *Indermaur* v. *Dames*, L.R. 1 C.P. 274 cf. *Pritchard* v. *Peto* [1917] 2 K.B. 173; and see also *Howard* v. *Walker* [1947] K.B. 860. Lord Simonds in *Jacobs* v. *L.C.C.* [1950] A.C. 361 admitted the capriciousness of such distinctions but maintained that they must exist so long as we distinguish between public and private property. With respect, it is difficult to see why the distinction between public and private property should *necessarily* lead to such strange results.

case revolutionises the whole approach of the courts to problems of this kind. Originally it was the tenant who was prima facie liable for injury arising from the defective state of the premises : see *Payne* v. *Rodgers* (1794) 2 H.Bl. 350. Now, according to Denning L.J., it is the landlord who is prima facie liable to the public, and it is doubtful whether he can escape liability by showing that the tenant is liable to repair. Originally the landlord only incurred liability at all because his right, or undertaking to repair gave him some degree of control of the premises. Now he is to be made liable even though it would be a trespass for him to remedy the defect in respect of which he incurs liability. Such a principle may be just where the landlord has created the nuisance or where he has let premises with a defect on them, but before it can be accepted more generally it must be seriously considered whether it does not place too heavy a burden upon landowners. One feels that the argument of Lord Kenyon C.J. in *Cheetam* v. *Hampson* (1791) 4 T.R. 318, still has some weight : ' Deplorable indeed would be the situation of landlords if they were to be harassed with actions for the culpable neglect of their tenants '.

In striking contrast to the tendency of the law of nuisance to impose an even stricter liability on the lessors of ruinous houses by the wayside stands the attitude of the law towards the owners of animals that stray onto the highway. The principle in *Searle* v. *Wallbank* [1947] A.C. 669, that the owner of tame animals that are being depastured in a field adjacent to the highway is under no duty to prevent their escaping onto the highway, is now beyond judicial dispute. The interesting questions are (1) as to the scope of the principle, and (2) as to its relation to the principle laid down in *Deen* v. *Davies* [1935] 2 K.B. 282 that ' if a horse is brought unattended on a highway in a town it is the duty of the person stabling it there to tether it securely ' (*per* Slesser L.J. at p. 288).

In *Wright* v. *Callwood* (1950) 66 T.L.R. (Pt. 2) 72, these problems are discussed and result in an interesting conflict of judicial opinion. In this case a farmer who had fields on both sides of a highway took two calves out of a field on one side of the road, drove them for some distance along the road and then along a drive leading to his farmyard on the opposite side of the road, leaving the gate to the drive open. The calves took fright because of the noise made by a starting lorry in the yard and bolted. One of them ran into the plaintiff who was passing the gate on her bicycle. The county court judge made two important findings :

(1) That the defendant knew of the presence of the lorry in the yard and of the fact that it might be started up at any moment.

(2) That at the time of the accident the animals were not being driven along the highway.

He held that on account of his second finding *Deen* v. *Davies* did not apply, and the majority of the Court of Appeal (Cohen and Asquith L.JJ.) agreed with this finding of fact and with the conclusion drawn from it. From his first finding of fact the county court judge deduced that this constituted a 'special circumstance' to oust the principle in *Searle* v. *Wallbank*. Cohen and Asquith L.JJ., however, disagreed with the finding of fact and hence held that *Searle* v. *Wallbank* applied.

Denning L.J., however, dissented, his view of the facts being entirely different from that of his brethren. He took the view that, the motor lorry being in the yard, it was up to the defendant to give evidence that he did not know of its presence; and he also thought that transit on the highway had not ended. In his view the duty of the defendant as a person driving animals along the highway ceased only when he had got the calves into a 'place of safety where they were not liable immediately to dash out again into the road' (at p. 81). He held further that there was evidence of negligence on the part of the defendant in letting the calves escape and that therefore *Deen* v. *Davies* applied. The majority admitted, or were prepared to assume, that if at the time of the accident the animals had still been on the highway *Deen* v. *Davies* would have applied, so that there is no dispute on the issue of negligence (see *per* Cohen L.J. at p. 76).

With respect, there seems to be much force in Denning L.J.'s view of the case, and it is submitted that it did not receive adequate consideration in the judgments of the majority. On the question of the duty of a person driving animals along the highway, it seems that the county court judge did in fact apply the test: 'have the animals crossed the boundary between the highway and the defendant's land?', for no other reason is given for his conclusion that transit on the highway was over. Yet this test is surely inconsistent with *Deen* v. *Davies*. With respect, it is submitted that the calves here were in a position materially indistinguishable from that of the pony in *Deen* v. *Davies*. The test applied by the county court judge and accepted by the majority of the Court of Appeal is surely a somewhat mechanical one. The test proposed by Denning L.J. is more consistent with *Deen* v. *Davies*, and likely to yield fairer results.

In conclusion, it seems that the different attitudes taken by the courts to highway accidents in cases of nuisance and animals respectively have led to results which, when compared, do not reflect creditably on our law, and that some re-orientation is required in these problems. The best approach, it is submitted, is to be based neither on the principle that a man venturing into the streets takes his chance of terrors (*per* Phillimore J. in *Dulieu* v. *White* [1906] 2 K.B. 669) nor on the principle that 'The law

of England has always taken particular care to protect those who use the highway' (*per* Denning L.J. in *Mint* v. *Good* at p. 1165), but on the principle expressed by Romer L.J. in *Harper* v. *Haden* [1933] Ch. 298 (at p. 320): 'The law relating to user of the highway is in truth the law of give and take'.

G. H. Treitel.

Innkeepers' Liability

The common custom of the realm imposes heavy responsibilities upon innkeepers. Apart from the limited relief afforded by the Innkeepers' Liability Act, 1863, they are, amongst other things, strictly responsible for the safe-keeping of all goods brought onto their premises by guests.

The recent decision in *Williams* v. *Linnitt* [1951] 1 K.B. 565 (C.A.) underlines the difficulties of the innkeeper's position. The plaintiff, who lived near an inn, left his car outside it one evening while he went in for a drink. The car was stolen while he was in the inn, and he sued the innkeeper for its value under the common custom of the realm. The place where the car was left was an open space in front of the inn, giving onto the highway, graphically designated by Denning L.J. in the course of his judgment as the sort of place one would expect to be described as a 'good pull-in for car-men'. The defence raised two points. First, it was claimed than an innkeeper's common law liability only embraces the property of people who are 'travellers' in the eye of the law (see *Bullen & Leake* (3rd ed.), p. 344), and it was said that the plaintiff, who was a local resident, merely 'dropping in for a drink', was not a 'traveller'. Secondly, it was claimed that, even where a plaintiff is proved or admitted to be a 'traveller', it is essential to liability that the goods concerned shall be within the precincts of the inn ('*infra hospitium*') at the time of its loss, and it was said that here the car was not '*infra hospitium*'.

The court (Lord Tucker, Asquith and Denning L.JJ.) decided in the plaintiff's favour, Denning L.J. dissenting only as to the second point. Their Lordships showed that the law in regard to the first point has undergone considerable historical development. There seems to be no doubt that until at least the early part of the eighteenth century, in order to be regarded in law as a 'traveller', a guest had to spend at least one night at an inn: thus a local resident going to an inn for a drink would not have been regarded as a 'traveller', and an innkeeper would not have been held strictly responsible for the safe-keeping of his goods. By 1793 (see *Bennett* v. *Mellor* (1793) Term Rep., 273) this rule had changed, and since *Orchard* v. *Bush* [1898] 2 Q.B. 284, it has become established—at any rate in respect of civil claims against innkeepers in relation to lost goods—that the word 'traveller'

means in this connection anyone who 'uses the inn, either for a temporary or a more permanent stay, in order to take what the inn can give' (*per* Wills J. [1898] 2 Q.B. at p. 287).

With regard to the second point, as far as the facts before the court show, no other garage accommodation was provided except the space already referred to, and the innkeeper had caused a notice to be placed there to the effect that it was a car-park for patrons, but that no responsibility was accepted for cars placed in it. Was this space therefore '*infra hospitium*'? If so, the notice would be a legal nullity since, apart from the Innkeepers' Liability Act, 1863, an innkeeper cannot 'contract out of' his common law liability. Was it beyond the '*hospitium*', with the result that the purported exclusion of liability would be superfluous? (see *Ashby* v. *Tolhurst* [1937] 2 K.B. 242). Or was the existence of the notice itself relevant to the determination of the question whether the space was 'within' or 'without' '*the hospitium*'? The majority of the court took the first view, with the result that the plaintiff won the action. Denning L.J. appears to have taken the third view: one cannot help feeling that there is much to be said for his decision, since, as he pointed out, a person who parks his car in an open space clearly courts the risk of theft.

Williams v. *Linnitt* has thus stressed the delicacy of an innkeeper's position, but it must be borne in mind that the strict rules of the 'common custom of the realm' only apply to *innkeepers*. No premises are legally an 'inn' unless they supply lodging accommodation. Hence the keepers of premises such as 'ale-houses', which provide amenities for guests, but do not supply lodging accommodation, will not be subject to the liabilities imposed by 'the common custom'. Thus in *Tinsley* v. *Dudley* [1951] 1 All E.R. 252 (C.A.: Sir R. Evershed M.R., Jenkins L.J. and Danckwerts J.) where a man left his motor-bicycle in a closed yard adjoining licensed premises which were admittedly not an 'inn', while he went inside for a drink, and the bicycle was stolen, it was held that, even though there was a notice in the yard bearing the words 'Covered yard and Garage', the keeper of the premises was not liable for the loss. The only possible grounds of claim lay in contract or bailment; there was no contract because there was no agreement between the defendant and the owner of the bicycle in respect of its custody, and there was nothing to show that the delivery of possession, actual or constructive, necessary to constitute a bailment, had been effected. (Compare on this point *Ashby* v. *Tolhurst*, *supra*.) The learned county court judge, from whose decision the appeal was made, appears to have thought that the plaintiff was clearly an 'invitee' of the defendant's, and that on this ground the defendant must be liable for the custody of the bicycle. This was clearly incorrect (see *Ashby* v. *Tolhurst*, *per* Sir W. Greene M.R. at page 249) for, as Jenkins L.J. pointed out ([1951] 1 All E.R. p. 259), the special relationship of 'invitor'

to 'invitee' is only relevant to determine the 'liability of the occupier of premises to persons coming on them with respect to the safety of the premises in point of physical condition'. The court therefore had no difficulty in disposing of the plaintiff's claim.

One peculiar point should finally be noted about *Tinsley* v. *Dudley*; it contains dicta by Sir R. Evershed M.R. (at p. 256) and Danckwerts J. (at p. 261) which might seem to suggest—if not read very carefully in relation to their context—that an invitor can never be liable under the rule in *Indermaur* v. *Dames* (1866) L.R. 1 C.P. 274, for damage to the property, as opposed to the person, of an invitee unless the damage to the property is merely incidental to the injury to the person. This is clearly not the case: the rule covers damage to property independently of damage to the person (see *Lax and Bainbridge* v. *The Mayor etc. of Darlington* (1879) 5 Ex. D. 28 (C.A.)).

Philip S. James.

Income Tax—Maintenance of Children

The decision of the Court of Appeal in *Yates* v. *Starkey* [1951] 1 All E.R. 732, has more important implications than may appear at first glance. The taxpayer had been divorced by his wife, who was given custody of the children, and had been ordered to pay her three annual sums 'of £100 less tax in trust for each of the three children . . . the [taxpayer] to claim children allowance'. In fact the wife, as guardian, made and was allowed the appropriate tax repayment claims on behalf of the children and the taxpayer was disallowed his claim for the statutory children's allowances on the footing that each was entitled (because of the Order) in his own right to an income exceeding £60 a year. He now argued that the court had no power under section 193 of the Judicature Act, 1925 (now section 26 of the Matrimonial Causes Act, 1950), to make an order in the terms quoted or, alternatively, that the annual sums remained his income by virtue of section 21 of the Finance Act, 1936 (the section which finally put an end to the efficacy of deeds of covenant in favour of children for the purposes of tax avoidance).

The court came to no final conclusion on the taxpayer's first argument, although they made it reasonably clear that in their view there was no power to make such an order. But as regards the second, they held that the order was a 'settlement' and the taxpayer 'a settlor' within the meaning of section 21. The court admitted that it was strange that payments made involuntarily under a court order should be deemed to be payable under a settlement, but they held that this conclusion followed inevitably from the definitions contained in the Finance Act, which said that 'settlement' should include 'any . . . trust' and 'settlor' 'any person who has provided funds directly or indirectly for the purposes of the settlement'.

A queer feature of the case is that the taxpayer and the Revenue were arguing staunchly against what must often be the best interests of Revenue and taxpayers respectively. Where both (former) husband and wife are surtax payers there are obvious advantages in arranging for the maintenance payable by the husband to become the children's income rather than the wife's. This benefits the family as a whole, including the father who may thus be able to persuade his wife to accept a smaller total of gross payments, and the value of these benefits far outweighs the relatively trifling loss of the children's allowances. Hence orders in the terms of that considered in the present case have become popular. But it now appears that they are probably invalid and, in any event, that they are ineffective for the purpose intended. This has caused considerable misgivings in the profession and among the wealthier divorcees and the victory of the taxpayer in the present case is far from being greeted as a triumph. Presumably the Revenue were satisfied that the net loss to them will be greater than if the decision had gone the other way . . . otherwise why should they have fought the case? . . . but on the face of it this is difficult to believe even allowing for the relatively small number of people in the higher income brackets. The decision also illustrates the dangers of applying the rule, now less often mentioned, that a taxing statute should be construed strictly against the Revenue. Had this rule been adopted in the present case (in fact it was not adverted to) it would have meant that a strict construction adopted in the interest of one taxpayer would have resulted in an interpretation detrimental to another.

Nevertheless the decision seems to be desirable in the social interests. A father who is in fact maintaining his children ought to be entitled to the allowances, but couples ought not to receive financial inducements to become divorced. Despite the decision such inducements are in fact offered. Not only does aggregation cease after a divorce but the advantages where the husband pays surtax are infinitely greater. A wealthy man who allows his wife £2,000 per annum can in no way deduct it from his taxable income for surtax purposes—so long, that is, as they are living together. But should they be divorced or separated he can then pay her the same amount under a court order or seven-year deed of covenant and have it allowed for surtax—the greater part of the £2,000 being indirectly provided by other taxpayers. Hence the parties become considerably better off financially as a result of the separation. Modern tax law (despite marriage allowances) penalises marriage—two cannot live together cheaper than one unless they live in sin—and encourages divorce. Well-meaning people who protest that divorces will be encouraged if they can be obtained as a result of seven years' separation (despite the fact that those who want to can and do obtain them immediately by a pretence of adultery) might

more profitably turn their attention to this aspect of the matter. Doubtless it will receive consideration from the Cohen Commission.

These objectionable features still remain, but at least their ambit is restricted by the present decision. And some care will now have to be taken in framing the terms of the financial arrangements, for if a court order can be a 'settlement' within the meaning of section 21 of the Finance Act, 1936, it can also, presumably, be a 'disposition' (which is similarly defined) within the meaning of section 20 of the Finance Act, 1922. Hence an order to pay sums to the former wife until a child (aged ten) attains sixteen might be ineffective for tax purposes since it will not last for more than six years. Whether this would be so if the order was a straightforward direction to pay is not clear, for the court thought that the order in the *Starkey Case* was caught because of the 'trust'. On the other hand their observations imply that a consent order might equally be caught as an 'agreement' or 'arrangement'.

This is a decision of which more will be heard.

L. C. B. Gower.

Assignment and Consideration in Action

The question of how far consideration is necessary for the assignment of choses in action is one in which the interest of academic writers and particularly those who frame examination questions has tended to outstrip the courage or resources of litigants, for *Re McArdle*, *McArdle* v. *McArdle*[1] seems to be the first case on the subject for some years to reach the Court of Appeal.

A woman spent £488 on improving and decorating a house in which she was living with her husband who, together with his brothers and sisters, was beneficially entitled—subject to a life interest—in the estate of which the house formed part. After these repairs had been carried out the husband induced his brothers and sisters to sign a letter to his wife promising to pay her £488 from the estate when distributed 'in consideration of (her) carrying out certain alterations and improvements'. The Court of Appeal did not doubt that this document had been drawn up on legal advice, or that as drawn it was unavailing. Since the repairs had long been completed the consideration expressed was past and the document could not operate as a contract. The court further held, however, contrary to the decision at first instance, that it could also not operate as an assignment, since although the assignment of an equitable chose in action may be valid without consideration it is essential that the assignee's title should be complete and perfect. This was not so here since the document purported to refer to work to be done in the future, and therefore before paying out the money to the assignee the executors would have been bound to ask

[1] [1951] 1 All E.R. 905.

the donors whether the work had been done and whether it was in order for them to make the payment.

The decision seems unexceptionable, but in the course of arriving at it the Master of the Rolls reviewed the 'vexed and difficult' problem of how far consideration was necessary for assignment of choses in action and said that in his view it was accurately stated in the following passage from the twenty-second (1939) edition of Snell's *Principles of Equity*:—

'Whether value is necessary for an equitable assignment is not clearly settled.

'It has been held that value is not necessary for an assignment of a legal thing in action which complies with the statutory provisions, and it would seem to be unnecessary also for an assignment of an equitable thing in action, such as a legacy or an interest in trust funds, provided that the assignment is complete and perfect; there is no reason why a man should not be able to give away an equitable interest as freely as he can give away a legal interest.

'But value appears to be necessary for an equitable assignment of a legal thing in action; such an assignment being inoperative at law, the assistance of equity is needed to make it effective, and equity will not assist to make perfect an imperfect gift.

'Value is certainly necessary for the assignment of rights of property not yet in existence'.

The rule that consideration is not necessary for statutory assignment but is essential for equitable assignment of a future chose in action is well settled; the present decision that it is unnecessary for equitable assignment of an equitable chose is to be welcomed, but what of the passage, which the Court of Appeal has now at least partly clothed with the mantle of its approval, that consideration is necessary for equitable assignment of a legal chose in action?

The authorities cited for this proposition in the twenty-second edition of *Snell* are *German* v. *Yates*[2] and *Glegg* v. *Bromley*.[3] This is strange, for in *German* v. *Yates*, Lush J. said he thought that 'the dictum in *Glegg* v. *Bromley* that for every equitable assignment there must be consideration applied only to the assignment of rights of property which were not yet in existence . . . It might be that if a creditor ordered his debtor to pay the money to some other person he might revoke the order if it was given without consideration; but if the creditor died without revoking it his executor could not ignore the transaction'. If a statement based on such authority is taken correctly to represent the law it would perhaps not be the first time that the law had been held to be embodied in a dictum and a later dictum disapproving it coupled with a *ratio decidendi* curtailing its operation, but such oblique methods of declaring the law can hardly be regarded as satisfactory.

[2] (1915) 32 T.L.R. 52.
[3] [1912] 3 K.B. 474.

The logical foundation of the position taken by the former editor of *Snell* is based on the reasoning that it is impossible to make a complete and perfect assignment in equity of a legal chose in action because the bare legal title is outstanding in the assignor; hence the need for joining the assignor in an action.[4] But in 1939 this reasoning was far from commanding universal acceptance; indeed the authorities and the views of text writers were so conflicting as to constitute what one learned writer has described as 'The Department of Utter Confusion'.[5]

In 1942 came the decision in *Holt* v. *Heatherfield Trust, Ltd.*,[6] in which Atkinson J. held that an assignment which would have been a valid statutory assignment had notice of it been received by the debtor could operate as an equitable assignment because the assignor had done all in his power to divest himself of the property, even on the assumption that there had been no consideration between assignee and assignor. Although the decision was doubted for other reasons[5] it was generally welcomed on the general ground and has been followed at first instance.[7] It is to be hoped that, in upholding the validity of voluntary equitable assignment of equitable choses in action provided the assignment is complete and perfect, the Court of Appeal will not now disturb this line of decisions and impose its incidental approval of a more stringent rule for the assignment of legal choses in action, since there is surely no good reason why a man should not be able to give away a legal interest as freely as he can give away an equitable interest.

O. M. Stone.

Confiscation by Foreign Governments and its Effect on Assets in England

Novello & Co., Ltd. v. *Hinrichsen Edition, Ltd. and Max Hinrichsen* [1] is the second important case in which the courts have been called upon to pronounce on the validity as far as assets in England are concerned of the legislation by which the Nazi Government deprived its Jewish citizens of their property.[2]

In *Frankfurther* v. *Exner* [3] Romer J. held that a Viennese Jew who escaped to England was entitled to claim from an English company the balance which had been outstanding to his credit with them when the Austrian Government (after Austria had been incorporated in the German Reich) handed over the control of his

[4] See Keeton, *An Introduction to Equity*, 2nd edition, p. 160.
[5] See R. E. Megarry (1943) 59 L.Q.R. 58 for a detailed and witty review of the position. See also H. A. Holland, *ibid.*, p. 129.
[6] [1942] 2 K.B. 1.
[7] *Re Fry* [1946] Ch. 312. *Re Rose* [1949] Ch. 78.
[1] [1951] 1 All E.R. 779.
[2] See also S. W. D. Rowson (1947) 10 Mod.L.R. 345.
[3] [1947] Ch. 629.

firm to an administrator, although at the time when, after having been arrested, he was removed from control of his property in Austria, he had been obliged to write to the English company telling them that no further dealings with this balance would be valid unless approved by the administrator, and although the administrator had, by subsequent transactions, incurred debts against the English company which they had proposed to offset against the credit balance of the original owner. Romer J. said he was satisfied that the decree which deprived the plaintiff of control over his property was confiscatory, and added[4]: 'It is quite true that the Nazis did not openly and unashamedly steal the property of the Jews by decrees clearly and unambiguously worded, until later on . . . but, if the expulsion by the State of a man both from the direction and the beneficial ownership of his business without compensation, coupled with the transfer of control to the State, for the benefit of the State, is not confiscation within the ordinary usage of that word, it is difficult to know what is'. The effectiveness of the decree was therefore limited to assets over which the confiscating Government had actual control and would be disregarded in respect of assets in England.

In *Novello & Co., Ltd.* v. *Hinrichsen Edition, Ltd. and Max Hinrichsen*,[1] the facts were considerably more complicated. This was an action by which the holders of two licences granted in 1940 and 1948 by the Comptroller-General of Patents, Designs and Trade Marks under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, sued the defendants for infringement of their copyrights under these licences. The defendants pleaded that the copyrights were in fact vested in Max Hinrichsen and that he had authorised Hinrichsen Edition, Ltd., to make use of the works in question. The case turned on the ownership of the English copyrights of a German firm the owners of which had been dispossessed by Nazi decree in 1938, after which the firm was sold by the Nazi-appointed administrator. It is perhaps worth while to recount the circumstances with some particularity.

The firm of C. F. Peters, music publishers in Leipzig, was owned by one Henri Hinrichsen, who in 1937 took into partnership his son Hans. In 1937 they appointed Novello & Co., Ltd., their selling agents in England but refused to assign to them any of their English copyrights. In 1938 the Nazi Government expropriated both father and son (the latter being already in a concentration camp) and appointed a custodian of the firm, who sold it in July, 1939, to two members of the Nazi Party at a price which Wynn-Parry J. found was 'a very gross under-value'. It was held, following *Frankfurther* v. *Exner*,[3] that this sale was plainly penal and confiscatory, and Wynn-Parry J. adopted the view expressed by one of the plaintiff's directors that the sale was a robbery. This

[4] At p. 635.

being so, the sale was ineffective to pass any interest in any English copyright owned by the Hinrichsens. It was therefore unnecessary to decide whether an accession agreement purporting to ratify the sale (which the two Hinrichsens were called to Berlin to sign immediately after the sale agreement had been completed whilst they waited in an adjoining room) was voidable as having been signed under duress, since ' neither the character nor the operation of the sale agreement could be changed by anything appearing in the accession agreement '. The ceremony of signing this accession agreement was, however, described in the judgment as ' nothing but a tragic farce '.

An additional reason why the sale agreement could not affect the English copyrights was that the sale was not ratified by the German Ministry of Economics until September 25, 1939, and in the meantime the Trading with the Enemy Act, which had received the Royal Assent on September 5, 1939, had provided that no assignment of a chose in action made by or on behalf of an enemy should be effective, without the consent of the Treasury, to confer any rights in respect of the chose in action.

Wynn-Parry J. also held that applications for licences under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, could only be made if the patent or copyright for which a licence was desired was held by one who was an enemy or enemy subject at the date of the application. Since Henri Hinrichsen had died in Belgium in 1942, predeceased by his son Hans, and by 1948 all the beneficiaries under his will were free of enemy character, the licence for certain of the Peters copyrights which the plaintiffs had obtained in 1948 was held to be ultra vires the Comptroller-General and invalid. The copyrights vested in Max Hinrichsen and were exercisable by him subject to any valid licences granted by the Comptroller-General. The court had no doubt that this 1948 licence would therefore be revoked, and suggested that if an application were made to the Comptroller-General to revoke the licence granted to the plaintiffs in 1940 he might well decide that circumstances had arisen which made it just and equitable for him to do so since, said Wynn-Parry J., ' upon the facts and evidence before me I am quite certain of one thing, namely, that the plaintiffs, Messrs. Novello & Co., Ltd., have no merits whatsoever. They have designed to cling . . . to their statutory licences at all costs. With this end in view they have involved the defendants in protracted and costly litigation in which every possible point, however technical, has been put forward and persisted in, although by their reply they assert that their only object is and has been to be satisfied as to the title of the defendant Max Hinrichsen to the English copyrights before dealing with them. In the circumstances their reiterated protests that they have had and still have at heart the best interests of the Hinrichsen family ring hollow in the ear '.

This part of the judgment serves as a reminder not only that the Court of Chancery was once a Court of Conscience, but also that the rule that the courts will not enforce confiscatory measures by foreign Governments is based on a rule of public policy which it is good to see so uncompromisingly re-affirmed. One is tempted to reflect, however, that if the Nazi Government had pursued their base ends by more indirect means, and instead of purporting to dispossess their citizens of all their property abroad, had by the operation of exchange restrictions or in some similar fashion merely prohibited them from enjoying the fruits of that property without permission of the German Government, and such legislation had been continued by a post-war Government, the decisions of the English courts might have read rather differently.

In *Kahler* v. *The Midland Bank, Ltd.*,[5] the House of Lords by a majority of three to two held that Nazi legislation in Czechoslovakia, continued by the post-war Czechoslovakian Government, was effective to prevent an American national and former Czechoslovak citizen from obtaining possession of his securities held in London by an English bank, although among the majority of their Lordships Lord Normand showed some awareness of the confiscatory possibilities of such currency regulations. This decision is the more curious as in dealing with discriminatory, confiscatory or penal legislation by foreign Governments the courts have always insisted on their duty to examine the true intention of foreign legislation. Thus Romer J. said in *Frankfurther* v. *Exner*[6] 'On the face of it the decree bears a semblance of innocence, but when one sees vague phrases such as "for the protection of important public interests", and "carrying on the business administered in a manner consonant with the public interest", one is entitled to inquire what manner of legislation it really was, and, for this purpose, to see what was done under it'.[7]

O. M. STONE.

AIDING AND ABETTING—ALIENS ORDER, 1920

IN *Wilcox* v. *Jeffery* [1951] 1 All E.R. 464; [1951] 1 T.L.R. 706, the defendant Wilcox was concerned with several musical enterprises and was, in particular, the managing editor of a periodical devoted to jazz music. Two persons other than the defendant organised a concert and applied to the Minister of Labour for permission for Mr. Coleman Hawkins, a famous American saxophone player, to perform at the concert. The permission was refused. It was announced nevertheless that Mr. Hawkins would play at the concert. When he arrived in this country, he was met at the

[5] [1950] A.C. 24.
[6] At p. 635.
[7] See also the remarks of Buller J. in *Folliott* v. *Ogden* (1789) 1 H.Bl. 123.

airport by the organisers of the concert and the defendant who had come to report the famous musician's arrival for his paper. The immigration officer was told of the decision of the Minister of Labour, it was explained to him that Mr. Hawkins would be 'spotlighted' at the concert the same evening, but would not perform himself. Mr. Hawkins, a citizen of the United States, was thereupon granted leave to land in the United Kingdom on condition that he did not enter employment paid or unpaid while in the United Kingdom. The defendant had taken part in the conversation with the immigration officer and was aware of the condition imposed on Mr. Hawkins.

The same evening, in the course of the concert, Mr. Hawkins was 'spotlighted', went on the stage, and played on a borrowed saxophone. The defendant was present at the concert, having paid for his ticket and being well aware that Mr. Hawkins would play. He did not protest against the American's performance, and reported the concert in the next issue of his periodical. The report or review was very detailed, illustrated, and in the most laudatory terms. The fact that his paper published it gave it valuable publicity and helped to increase its circulation.

Under the provisions of the Aliens Order, 1920, as amended (S.R. & O. 1920, No. 448) an alien may not land in the United Kingdom without the leave of an immigration officer (s. 1 (1) (*a*)); an immigration officer may attach conditions to a grant of leave to land, and if an alien fails to comply with the conditions imposed on him he is deemed to be an alien to whom leave to land has been refused (s. 1 (4)). If any person fails to comply with a condition imposed under the Order, he is deemed to contravene the Order (s. 18 (1) (*a*)), and if any person aids or abets any person in any contravention of the Order, he is guilty of an offence against the Order (s. 18 (2)).

The defendant was charged with aiding and abetting contrary to section 18 (2) of the Order. The learned magistrate took the view that Mr. Hawkins had, by playing at the concert, taken unpaid employment, thereby failed to comply with a condition imposed by an immigration officer, and consequently contravened the Order: he found that the defendant had aided and abetted Mr. Hawkins in his contravention of the Order, convicted him under section 18 and imposed a fine. The defendant appealed by way of case stated; the Divisional Court held that there had been evidence to support the magistrate's findings and affirmed the conviction. The Lord Chief Justice pointed out that Mr. Wilcox had not only, by attending the concert and paying for his ticket, encouraged Mr. Hawkins' illegal action which he knew to be illegal, but had done so for his own advantage in order to get copy for his paper.

The decision appears to the writer to be unsatisfactory and, as a precedent, dangerous in that it involves a certain amount of

interference with the freedom of the press. The fact that the defendant had 'written up' Mr. Hawkins and the concert seems to have been an essential ingredient of his offence. It would appear that he would not have been convicted if he had either published a damning review which would not have been justified by the American's performance, or else failed to report, at least as extensively as he did, an event of importance to his readers. The decision does in a sense require him to have done the latter, and, whatever its merits or soundness, it seems unfortunate, on grounds of public policy, that the Aliens Order should have, or be given, so wide an effect as to interfere, needlessly it is submitted, with the freedom of expression of opinion.

W. A. Steiner.

Negligence—Loss of Consortium by Wife

In connection with the Note by E. C. E. Todd in Vol. 14, p. 84, on the case of *Best* v. *Samuel Fox & Co., Ltd.* [1950] 2 All E.R. 798, we are indebted to Prof. F. F. Stone, of the College of Law, Tulane University of Louisiana, for drawing our attention to a decision of the Court of Appeals of the District of Columbia in *Hitaffer* v. *Argonne Co.*, 183 Fed. (2nd) 811 (1950), where the court reached the opposite conclusion and allowed the wife to recover damages in circumstances similar to those in which the action was dismissed in the English case. The American case (together with a number of other relevant decisions) is noted by D. J. Conroy in (1951) 25 Tulane L.R. 293.—Ed. Cttee.

REVIEWS

THE AMERICAN MIND. By HENRY STEELE COMMAGER. [London: Geoffrey Cumberlege, Oxford University Press. ix and 476 pp. (with index). 30s. net.]

THE Oxford University Press is making available in this country important American publications at a reasonable price. Professor Commager's interpretation of American thought and character since the 1880's which was published in the first instance by the Yale University Press is a happy instance of this policy, and English readers who have been sufficiently interested in American institutions and culture to acquire an elementary knowledge of them will be grateful for the opportunity to obtain it. Professor Commager does assume such a knowledge, and without it the value of much of his interpretation and reflection is likely to be lost.

In spite of its substantial volume the scope of the study is not quite comprehensive, for it is confined to literature (including journalism), philosophy and religion, economics and sociology, law and history, and architecture. Thus some of the spheres in which the American mind has shone most brilliantly, such as the natural and applied sciences, anthropology, psychology, and education, have been omitted. However, to cover the field selected with the competence here displayed is a feat of which few historians would be capable, and Professor Commager is to be congratulated on the sustained interest and quality of his work.

I propose to make only a few comments of a general character before discussing the two chapters on the recent development of American law which are naturally likely to be of most interest to readers of this Review. Professor Commager opens with a long and important introductory chapter on the Nineteenth Century America. Rather surprisingly, considering the prominence given to political action as well as to political thought in the book, there is a complete absence of reference to Jacksonian democracy, a topic which has certainly not lost its importance in modern American writing, and an outlook from which so much in the later radical movements, to which the author rightly attributes such great importance, has in large measure stemmed. This is the more difficult to understand in view of the tribute paid to the thought of Calhoun which Professor Commager admits was largely irrelevant to the development of American political structure.

No one who is even superficially acquainted with American literature could deny that it has always had in it a vein of deep pessimism which has perhaps thickened in the period under discussion. It is in striking contrast to the general exuberance and vitality of American life, and of the broad if rather superficial stream of American culture. That some authors of eminence have done much to the building of it up naturally leads the unwary to place excessive emphasis upon it; but this is hardly what one would expect from so accomplished a historian as Professor Commager. His judgments on cultural matters appear to me to be impaired by his strong ethical reactions, and afford a good illustration of the working of what has been called 'the moral fallacy'. Authors like Dreiser and Hemingway ought not to be appraised in the light of conventional moral codes, but by the vitality and impact of their work which seems to me to be likely to award them a fame which Professor Commager is unwilling to grant. Similarly, the beauty or absence of beauty in skyscrapers is not really related to the question of whether they are socially desirable or not.

Again the genuine liberalism which continuously manifests itself in these pages handicaps the author in both æsthetic and political judgment. His appreciations of William James and John Dewey are uncritical, and when he comes to law Roscoe Pound receives much the same sort of praise. More radical thinkers are not mentioned, or passed over in a half contemptuous aside. One can well imagine that the late Professor Laski's views would not be congenial to Professor Commager, but some of his writings on American institutions such as his *American Presidency* show such insight that they should not have been passed over in a work which makes frequent reference to the views of non-American observers. Indeed Professor Laski's *American Democracy* covers much of the ground traversed in this book, and despite its obvious faults of repetition and overemphasis does so frequently with a penetration which is denied to Professor Commager, who is unable to detach himself sufficiently from the American scene.

The two legal chapters are entitled the Evolution of American Law and the New Jurisprudence respectively—the first is in a sense preparatory to the second. In it an estimate is made of the importance which law has throughout played in the life of America. Not only have Americans in their Supreme Court an institution of a character and power not elsewhere known, but lawyers acquired such a dominating position in politics and even in business that Professor Commager can describe them without undue exaggeration as taking over in the nineteenth century these fields of activity.

Nevertheless, until the time of Holmes their influence was exerted almost entirely in traditional, if not in conservative, directions. This was no doubt because their philosophy had its roots in the common law and had been moulded by the doctrines of natural law. In the absence of any exponents of historical jurisprudence of the calibre of Maine or Maitland that school of thought never developed any real hold upon American legal thinking, which remained until recently much more under the influence of eighteenth-century orthodoxy than did that in England.

It was left for Holmes to construct what Professor Commager calls the New Jurisprudence. Not unexpectedly, he brackets the name of Pound with that of Holmes, but it is certainly surprising that he does so in that order. Not that he ranks Pound as high as Holmes either in ability or influence, but he seems to me to overestimate the calibre of the former. Stimulating and fruitful as the work of Pound has been it altogether lacks either the deep penetration into the legal problems of society or the profundity of insight which marks the thought of Holmes. No doubt there is a certain anarchic quality in Holmes, but compared with him Pound is of light metal, and his systematisation of 'progressive legal thought' which Professor Commager praises so highly lacks the highest quality for this very reason; it is a weakness which he shares with William James who, rather than Holmes, was his real master. Brandeis is introduced to make a triumvirate, but little attempt is made to assess the quality of his contribution, and most of those who were influencing legal thinking in the decade before the war like Frank and Llewellyn are hardly mentioned.

It must, however, be recollected that this volume is not intended for students of legal theory, but for the educated public. For the purpose which he had in mind Professor Commager was no doubt wise to concentrate upon the work of a few outstanding lawyers. He gives a clear and sympathetic account of the accomplishments of Holmes in the Supreme Court, and his summing up of Pounds' contribution to the building of a sociological jurisprudence, though short, is pithy and informative.

After reading the four hundred and fifty odd pages of Professor Commager's survey one is left with a better idea of the American character than of the American mind. Is there a typical American mind? The quality of a mind is only in part governed by the environment in which it works. And it has been the accident of American history that the heredity of many of the best minds has been derived, and derived at but a short span, from almost every

country in Europe. Again, some of those whose heredity was most genuinely American have been nurtured as much or more in Europe as at home. In reading these pages it is not possible to find any uniformity of mind of the kind which enables us to speak of the French, the German, the Russian, or the English mind. There is perhaps among all these interesting men and women a majority who might in a general way be described as pragmatists. The life of America has not lain in logic, or in philosophy, or even in the religions which the United States were colonised to protect; it has lain in the experience of developing a virgin continent with extraordinary speed, and by means of a most cosmopolitan army. And this great fact undoubtedly colours the work of many, perhaps the majority, of her thinkers, at any rate in recent times. It is in this practical experimental mood that the American people are likely to meet the challenge of the future. And as Professor Commager says in an eloquent concluding passage, the whole world has an interest in the way that challenge is going to be answered.

C.

The Legal Philosophies of Lask, Radbruch and Dabin. Translated by Kurt Wilk, Associate Professor of Government, Wells College. Introduction by Edwin W. Patterson, Cardozo Professor of Jurisprudence, Columbia University. [Cambridge Massachusetts : Harvard University Press. London : Geoffrey Cumberlege. Oxford University Press. xliii and 493 pp. $7.50.]

A student of jurisprudence, desirous of being introduced to the legal philosophy of Continental Europe could hardly find any other single volume better suited to his purpose than the present one. Perhaps he would do well to study it in reversed order. Dabin's textbook of legal philosophy is probably easier to understand than either of the two other contributions. It deals with practically every problem which interests contemporary Continental legal philosophers. It states opposing views with accuracy and fairness. The author's own standpoint, which is that of Catholic legal philosophy, is argued with great lucidity and persuasiveness and with a tolerance which cannot fail to win sympathy for both, the author and his case. There is probably no other short handbook of contemporary Thomistic legal philosophy which combines as well as Dabin's book a thorough treatment of practically all questions in the field of legal philosophy, as understood on the European Continent, with a graceful style which leaves no obscurities of meaning. The author has a fortunate way of illustrating his thoughts with examples from legal practice which should impress even those readers who are inclined to think that the problems of legal philosophy are nothing but academic theory.

To pass over from Dabin to Radbruch means, of course, entering a different world. Professor Patterson in his Introduction says that neither Radbruch nor Dabin was an original thinker. This is clearly true as far as Dabin is concerned, whose ambition is not to set forth an original system but to state fairly and well the traditional thinking of the school to which he belongs. But one may well doubt whether it is equally true of Radbruch. It may be admitted that Radbruch's system consists of a number of parts, each of which is taken from the thought of another philosopher. Thus the sharp distinction between value and reality is Kantian. His relativism bears the traces of Jellinek's and Max Weber's influence. The influence of Lask and F. v. Liszt, too, is freely admitted by him. The list could easily be extended. But the value of Radbruch's work does not lie in its component parts. It lies in the finished building which these parts have helped to form. It lies in the manner in which a moderate and wholly tolerant socialism is combined with the best elements of German idealism, thus forming a grand total of humanist rationalism, which inspires even where it fails to convince.

There is no need to set forth within the framework of this review a summary of Radbruch's thought. This has been done supremely well by Professor Friedmann in his *Legal Theory*. It is, however, necessary to warn English readers against the assumption either that the present work or Professor Friedmann's summary represents the final stage of Radbruch's philosophical development. This erroneous impression is unfortunately lent some colour by the first two sentences of the Preface, where Radbruch says that his work was intended to 'clean up and close up' and that 'this book is to bring to a close this author's legal philosophical tasks'. Fortunately it did nothing of the sort. Though in 1932 the author intended to 'make the remaining time of his life available for other tasks', legal philosophy continued to retain his interest, as is witnessed by his numerous later contributions to learned periodicals in which he elaborated, restated and partly very considerably amended the views set forth in his textbook. Finally, two German students who attended his lectures in Heidelberg which he resumed after the fall of the Hitler regime published their lecture notes with Radbruch's approval under the title 'Vorschule der Rechtsphilosophie'. A comparison of this little work, published in 1948 with the treatise translated here, shows how far Radbruch had moved away from the positions which he had held in 1932. The experience of the intervening years had in particular rendered it impossible for him to retain to the full the convenient relativism of his earlier years. Few readers of the work translated here would expect this author to conclude his final work on legal philosophy some fifteen years later with a moving appeal to 'natural law' as the only guiding star in the legal chaos left by the Hitler regime.

Lask's short treatise has—at least for the Anglo-American reader—hardly more interest than that of providing the immediate historical basis for much in Radbruch's system. Professor Patterson's graceful Introduction admirably combines with its chief purpose of helping the student over some of the more fundamental difficulties of the three authors' thoughts that of placing them into the framework of contemporary thought and of providing some critical notes on their main theses. It remains to add that Professor Wilk has performed the difficult task of translating Lask's and Radbruch's German and Dabin's French into English in an altogether admirable manner. Very little of Radbruch's elegance and of Dabin's charm is lost in this translation notwithstanding the high degree of accuracy and consistency with which French and German technical terms are rendered in English. Unobtrusive notes help readers over some difficulties which are unavoidably faced by any lawyer who has to study a legal philosophy which has been developed under legal systems other than his own. The result is a work which maintains in every respect the extraordinarily high standard achieved by the three earlier works in the same series.

E. J. COHN.

THE LAW OF THE UNITED NATIONS, A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS. By HANS KELSEN. Published under the auspices of the London Institute of World Affairs. [London : Stevens. 1950. xvii and 903 pp. Index. £5 5s. net.]

A COMMENTARY ON THE CHARTER OF THE UNITED NATIONS. By NORMAN BENTWICH and ANDREW MARTIN. [London : Routledge & Kegan Paul. 1950. xxviii and 239 pp. Bibliography. Index. 18s. net.]

PROFESSOR Kelsen's voluminous work, as is to be expected from the chief exponent of the pure theory of law, is a juristic and not a political approach to the problems of the United Nations. It is a scholarly and thorough

analysis of the legal aspects of the Charter and special emphasis is placed on the legal technique involved.

The work is divided into three parts, dealing respectively with the legal problems relating to the Purposes, the Organisation and the Functions of the United Nations. Limiting himself essentially to the literal, logical and organic methods of legal interpretation, the author expounds in masterly and exhaustive fashion the import of the various provisions of the Charter, including the principal articles of the Statute of the International Court of Justice. He demonstrates the often more than one possible meanings and constructions that may be attributed to the different terms and provisions of the text, excluding neither those which may not correspond to the real or supposed intention of the framers of the document, nor those which he himself, if called upon to apply the Charter, would reject as undesirable. At the same time, with a merciless purism, he exposes the numerous pleonasms, obscurities, ambiguities, inconsistencies, contradictions, and other shortcomings in the legislative technique of the constitutive instrument of the United Nations. Precisely as a learned judge of the International Court of Justice has recently observed, 'one cannot expect the Charter to be a model of precision and technique made as it was by the hasty adjustment of separate parts prepared in different workshops' (*ICJ Reports, 1950*, p. 27), and such a document affords Professor Kelsen ground for much stimulating criticism at each turn. At times, however, this is pursued almost to a fault. For instance, regarding Article 27, para. 3, which is worded as follows:—

> 'Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting',

he says:—

> 'The obligation to "abstain from voting" as it is formulated in the second part of Article 27, paragraph 3, may be violated. The representative of a member may cast its vote in spite of the fact that the Security Council is of the opinion that this member is excluded from voting. In this case the vote illegally cast by the representative must not be counted. Hence it would have been more appropriate to formulate the rule concerned as follows: In decisions regarding a dispute, if taken under Chapter VI and under Article 52, paragraph 3, the votes of the parties to the dispute must not be counted' (p. 264).

While it may be admitted that this provision is by no means well drafted, the above criticism does not appear altogether apposite; for it would seem more logical to establish first the obligation of the members concerned to abstain from voting and then either to stipulate expressly the sanction of not counting any votes that may be cast in violation of such obligation or not to make any such mention treating the sanction as a matter of course, rather than merely to provide for the nullity of the votes of the members concerned without mentioning that they are under an obligation to abstain.

Furthermore, as a result of the emphasis being laid on the legal technique involved, a certain disproportion sometimes exists between the length of discussion and the importance of the subject-matter. Though, in the matter of interpretation, the author attributes but secondary juridical importance to both *travaux préparatoires* and subsequent practice, the reader is, however, not deprived of the light which these materials may shed on the proper construction of the Charter; for they are amply referred to and quoted in the copious footnotes. The author also refuses to attach decisive weight to the functional or teleological method of interpretation, believing that the choice of the most desirable interpretation amongst all those possible is within the province of those who apply the law rather than the jurist as such.

While one may disagree with the whole approach of the Vienna School on the static and limited rôle assigned to the jurist, one must agree that Professor Kelsen in this work, as in so many of his writings, has developed this particular part into a fine art, and the London Institute of World Affairs is to be congratulated on bringing out in this country this truly important work which will prove indispensable to every serious student of the law of the United Nations and invaluable to anyone interested in international law and international relations, apart from being of the utmost interest to those engaged in the work of international legislation.

Of a very different bulk and calibre is, however, the *Commentary on the Charter of the United Nations* by Professor Bentwich and Dr. Martin. Beginning with a brief account of the evolution of the Charter, it gives a succinct commentary to the Charter, article by article, much after the fashion of, but falling in many aspects behind, the already well-known Commentary by Professor Goodrich and Dr. Hambro, of which a second and revised edition was in 1949 published in this country under the auspices of the London Institute of World Affairs. Especially after reading Professor Kelsen's interpretation of the Charter which abounds in scepticism, one could hardly avoid being taken aback sometimes by the seemingly facile dogmatism of the authors. For instance, to identify the word 'intervene' in Art. 2 (7) simply with its 'technical meaning in international law' is, to say the least, problematical, and the statement, in their commentary *ad* Art. 9, discussing the character of the General Assembly, that 'the Charter prescribes a clear-cut differentiation of competence' between the General Assembly and the Security Council, is susceptible of being easily misunderstood. For, even without taking into account the more recent development within the United Nations, it is well-known that, under the Charter, the General Assembly and the Security Council exercise, in certain matters, either joint or concurrent competence, *e.g.*, with respect to the settlement of disputes and adjustment of other situations, which function is within the competence of the General Assembly under Arts. 11 and 35 as well as within the competence of the Security Council under Arts. 34 to 38. Characteristic is perhaps the following statement in the Preface, 'Where we say that a point is controversial, the reader must take our word for it'. Need it perhaps be added that even where it is not so said, the point may yet be controversial?

B. CHENG.

THE ASSIGNMENT OF CHOSES IN ACTION. By O. R. MARSHALL, M.A. (cantab.), PH.D.(lond.), Barrister-at-Law. [London : Sir Isaac Pitman & Sons, Ltd. 1950. xxiv and 216 pp. 30s.]

THIS book was originally written as a Ph.D. thesis and although most universities make fitness for publication a condition for the award of a Doctorate, it must be confessed that even a good thesis (and this is indeed a good one) can rarely be a commercial success. Messrs. Pitman are therefore to be congratulated upon their courage and disinterestedness in adding it to their Equity Series and it would be churlish in the circumstances to criticise the high price.

Hitherto this subject has been treated, somewhat perfunctorily, in general works on contract, personal property and equity, and there is little doubt that there was room for the separate and more detailed treatment which it has now received. Dr. Marshall, perhaps, started over-ambitiously, for in Chapter I he defines choses in action so as to include Patents, Copyrights, Trade-marks and Shares, thus misleading the reader into supposing that he will deal with the special rules relating to their assignment. In fact it is only the general law, relating to the assignment of choses in action and in equity, which is dealt with, but this is treated most exhaustively and with a

detailed analysis of the decided cases. The only possible criticism of this analysis is that Dr. Marshall's determination to cover all the decisions sometimes leads him into what seems unnecessarily detailed treatment of each of a consistent line of cases. It is, however, only rarely that this criticism is valid because this branch of the law has not been characterised by much consistency.

It is also good to see copious references to other textbooks and to periodical literature, but it could be wished that Dr. Marshall had cast his net more widely and referred to the practitioners' books, such as *Withers on Reversions* and books of Conveyancing Precedents, as well as to academic literature.

In general Dr. Marshall seems to be more interested in case law than in statutes; his treatment of L. P. A., ss. 136 to 137 is hardly adequate, and although irrevocable powers of attorney are constantly referred to (incidentally the statements at p. 143 cannot be accepted without qualification) ss. 124–5 are only once cited, and then only in a footnote without any explanation of their effect. It is also thought that the arrangement of the various chapters (particularly Chapter 4) is somewhat confusing and that the book could be further improved by the pruning away of certain clumsy sentences (*e.g.*, 'the tests applicable to determining what is an effectual transfer are not the same in cases of transferable and non-transferable choses in action'—p. 90) and tautologous expressions (*e.g.*, 'such as, for instance'—p. 56). In any pruning, conclusion 4 on p. 171 might well be cut out completely: 'It appears, however, that the presence of an equity of redemption renders an equitable assignment one by way of security only' is a statement of the obvious, which, in its context, is liable to mislead the reader into supposing that a mortgage cannot be an absolute assignment within the meaning of L. P. A., s. 136. The authority cited (*Re Kent and Sussex Sawmills* [1946] 2 All E.R. 638) was in fact concerned only with the question whether a certain assignment by a company of its book debts was an out-and-out sale or a charge requiring registration under the Companies Act, 1929, s. 79.

These, however, are small criticisms which do not detract from the fact that this book is a genuine contribution to legal scholarship which should prove a valuable source of reference on the many vexed questions (especially the extent to which valuable consideration is necessary to support an equitable assignment) with which this branch of the law is still obscured.

There is a very complete Table of Cases, but the Index is inadequate and the Table of Statutes of little value since sections are not separately indexed. The task of finding one's way about is not aided by the learned author's habit of cross-referencing by Chapters (all of which are over thirty pages long) instead of by pages.

L. C. B. G.

Lindley's Law of Partnership. Eleventh Edition. By Henry Salt, K.C., M.A., LL.B., and Hugh E. Francis, LL.B., Barrister-at-Law. With a Foreword by the late Lord Uthwatt. [London: Sweet & Maxwell, Ltd. 1950. cix and 1227 pp. £6 6s.]

As the late Lord Uthwatt says in his brief Foreword 'The profession of the Law will be happy to know that two active equity practitioners have found the time and enthusiasm to prepare the present, eleventh, edition' of Lord Lindley's classic. The profession will also confirm that the results fully justify Lord Uthwatt's confident expectation that no pains would be spared

'to render the book thoroughly up to date and serviceable and at the same time reverentially to preserve the distinguishing marks of the original authorship'.

Some readers may wish that the learned authors had displayed a little more boldness and less reverence, for the basic considerations weighing with those who enter into partnerships have undergone substantial changes since 1860 when this book was originally written. At that time income tax and death duties were not serious factors and Lord Lindley was not concerned with them, but today they are perhaps the most important practical concern of any, and the practitioner might reasonably expect to find some guidance on their impact on partnerships in this the leading textbook. If so his expectations will be disappointed.

This however, is not a criticism of the editors, for it is the accepted (but perhaps unfortunate) convention that editors of another's book merely bring up to date the treatment of matters dealt with by the author and do not venture into new fields however likely it may be that these would have been explored by the original author had he been writing today. Within the limits of this convention they have done their work most thoroughly. Some fifty new cases have been noted and almost as many statutes. None of these, however, has led to any substantial alterations and some may feel that the importance of certain cases has been underestimated. For example, *Tower Cabinet Co.* v. *Ingram* [1949] 2 K.B. 397, and *Re a Debtor* (*No.* 564 *of* 1949) [1950] Ch. 282, each seems to require more than a mere citation in the footnotes; certainly the latter (noted only at p. 96) should also have been referred to at p. 765 where it renders inaccurate a statement in the text. And some may think that the exploration of 'tracing' in the *Diplock Case* has greater importance for the law of partnership than one footnote citation would suggest. It is also submitted that the method employed of bringing up to date the references to the Companies Act leaves something to be desired; in general the sections of the 1929 Act are left in the text and amended by footnote references to the 1948 Act (but at p. 674 the alteration is made in the text but not in the marginal note).

The chapters on Bankruptcy have generally been regarded as the least satisfactory part of the book and the learned editors do not seem to have made any conspicuous improvements. Nor, perhaps, have they been sufficiently ruthless in cutting away the dead wood which inevitably accumulates after ninety years. For example, is any useful purpose served by continuing to devote seven pages (665–672) to the law relating to actions between partners prior to the Judicature Acts? And the repeal by the Criminal Justice Act, 1948, of various provisions of the Forfeiture Act, 1870 (dealt with at p. 94) has escaped their vigilance.

The learned editors have dealt with the effect on Medical Partnerships of the National Health Scheme by adding a useful Appendix summarising the provisions of the various Acts and Regulations. Unfortunately they have modestly declined to give us the benefit of their opinion on the points of doubt and difficulty which arise. They might at least have helped us by drawing attention to the doubtful questions even if they were not prepared to hazard a guess at the answers.

These, however, are small points of criticism, and largely matters of personal opinion. What is beyond doubt is that the work has been re-edited skilfully and painstakingly and that it has been given a new lease of life as the leading practitioners' textbook on an important branch of the law. It is too much to expect two busy practitioners to do more and all too often editors in their position have done far less. But if *Lindley* is to retain its place in our affections during a second century, somebody—sometime fairly soon—will have to carry out a major rejuvenating operation, for though it has worn well it begins to show signs of its advanced age.

L. C. B. G.

SHAWCROSS ON THE LAW OF MOTOR INSURANCE. Second Edition. By CHRISTOPHER SHAWCROSS, K.C., of Gray's Inn and the Midland Circuit, and MICHAEL LEE of the Middle Temple. [London : Butterworth & Co. (Publishers), Ltd. lxxxix and 752 and (index) 92 pp. 75s. net.]

THIS monumental performance made its first appearance, in the name of Mr. Shawcross alone, in 1935 and was immediately hailed with delight by the legal profession, both on the Bench and at the Bar. It gave one a feeling of pride that in our own generation a practising member of the Bar had found the time and energy to compile a comprehensive legal classic worthy to take its place beside the old masters of the past, *Lindley on Partnership, Fry on Specific Performance* and the like. Like these works it promptly achieved the distinction of being authoritative, a flattering, if at times no doubt an embarrassing, position for a practising junior.

The second edition has now appeared and, Mr. Shawcross having for a time immersed himself in other activities, much of the work of revising and recasting and bringing up to date the comprehensive body of material devolved upon Mr. Michael Lee. With the concurrence of the original author, he has not hesitated to be drastic, and it may be said straight away that the whole arrangement is considerably improved. There was always a certain amount of prolixity in the original work, with its detailed discussion first of the legislation and then of the standard form of policy, although the two so largely overlapped, and one was rather too frequently tossed to and fro in the book before one really got to the bottom of a point. Much of this has now been eliminated, to the great advantage of the seeker after enlightenment. There has also been considerable expansion of topics which previously were covered somewhat too cursorily, for example, the section dealing with liability arising from the use of motor vehicles. As recast this now makes an extraordinarily good account of running down law.

Perhaps the most important addition to the book is the chapter dealing with the Motor Insurance Bureau. The authors somewhat wistfully remark that 'with the conclusion in 1946 of the agreement with Minister of War Transport' (as he then still was) 'the development of motor insurance law reached a definite stage from which future advances will be slow and short'. This may put too low a premium on the ingenuity of insurance companies and their advisers, but there is no doubt that, from the point of view of the injured third party, the agreement is a milestone in the development. Whether it is the end of the road remains to be seen. It is certainly a very odd set-up, and produces some awkward problems, at any rate for practioners. For example, X may be sued as the driver of a car at the time when it is involved in an accident. His driving may be wholly outside the scope of the insurance policy issued to Y, for which reason, or maybe because it is the truth, he denies that he was driving at the relevant time although he had been driving previously. The injured person goes against the Motor Insurance Bureau who, pursuant to the domestic agreement, pass the case over to be dealt with by the insurance company who had issued the insurance policy in respect of the car. The latter may think there is little prospect of X's story being accepted and their solicitors and counsel may think likewise. But, although the solicitors and counsel may be instructed by the insurance company, the client on the record is X and he may insist on running his bogus defence at the insurance company's expense (*Groom* v. *Crocker* [1939] 1 K.B. 194). Furthermore, if the plaintiff succeeds in the action, it is a condition of his being paid his damages and costs by the insurance company that he assigns his judgment to the insurance company, which means that X, the legal if not the equitable client, is from the word 'go' the potential enemy. It is very difficult for solicitors and counsel to conduct litigation with such a confusing conflict of duties hanging around them. The

concurrence of X has to be obtained at every stage although his concern at the prospect of having to foot the bill may be no more than nominal.

Still problems like those are for practitioners to sort out. Meanwhile one must be grateful to the authors of this book for their illuminating examination both of the main agreement, and of the domestic agreement between the insurance offices which back the Bureau, and also of the historical and legal context in which they came about. It is far and away the most comprehensive examination of a topic which is bound to be of growing importance as the years go on.

On the general editorial side, the work has been done thoroughly and intelligently. The volume of case law since 1935 has been carefully studied and worked in, and all the more important decisions are fully examined and discussed. The Merle Oberon case (*Digby* v. *General Accident Fire & Life Assurance Corporation, Ltd.* [1943] A.C. 121) rightly receives the most attention as it touches on matters of such fundamental import in the law. The treatment of *Austin* v. *Zurich General Accident & Liability Insurance Co., Ltd.* [1945] K.B. 250, is also exhaustive and valuable. It would, however, rather help the practitioner if, in the Index of Cases, the places where the main discussion of important decisions like these occurs were indicated in heavy type. Another case which receives the attention it deserves is *Sutch* v. *Burns* [1943] 2 All E.R. 441, perhaps the most unfortunate decision ever given on the Road Traffic Acts. Fortunately the Court of Appeal reversed it on other grounds ([1944] K.B. 406) and *Ellis* v. *Hinds* [1947] K.B. 475, relegated it to limbo. In the next edition it will be interesting to see what view the authors take of *Mallett* v. *Dunn* [1949] 2 K.B. 180, which has caused such a flutter in insurance dovecotes.

One rather minor criticism may perhaps be raised in conclusion, and that is in relation to the opening of the book. Part 1 of Chapter 1 deals (or purports to deal) with the general principles of the law of contract in seven pages and Part 2 of the same chapter does likewise for the law of arbitration in the same number of pages. Such treatment can only be cursory in the extreme, and gives an entirely false idea of the impressively analytical treatment which follows when the authors come to grips with the kernel subject in the Road Traffic Acts and the making, construction, operation and effect of motor policies. I venture to add my voice to that of the reviewer in *The Law Quarterly Review* in favour of abolishing these two parts altogether. After all, one cannot cover everything that is bound to infringe upon a topic so wide and general as motor insurance, and it is surely better to send the reader away to other works on subjects which cannot be adequately treated. A book is always the better for concentrating entirely on the topic in hand, and this book is so good that it is a pity to have superfluous blemishes.

STEPHEN CHAPMAN.

MOTOR CLAIMS CASES. By LEONARD BINGHAM, Solicitor of the Supreme Court. Second Edition. [London: Butterworth & Co. (Publishers), Ltd. 1951. xxxvi and 611 and (index) 36 pp. 42s. net.]

THIS admirable work has reached its second edition in five years, with two supplements intervening. What the academic lawyer makes of it is a matter for the imagination, but one can visualise devotees of the Benthamite gospels rushing around screaming 'Codify him; codify him'. From the point of view of the practitioner, however, so long as the law continues to consist of a patchwork quilt of odds and ends and bits and pieces, with the Great God *stare decisis* attempting to produce some sort of order, and Parliament periodically chipping in to knock the whole pattern topsy turvy again, it is

indispensable to have digests and guide books and encyclopædias of one sort or another in which the essential materials can be readily found. This is the purpose that Mr. Bingham's book serves. It is not a book with which, and with which alone, one can march into court and announce—'My Lord, Mr. Bingham says so and so and therefore the defendant is entitled to succeed, unless of course your Lordship fakes the facts'. Mr. Bingham does not profess to be authoritative or even, being happily still alive, to be adopted as part of the argument. He does, however, profess to supply in handy, get-at-able form everything which, in the field covered, the practitioner knows or ought to know, and nothing which a judge is likely to think important or helpful will be missed if the book is used intelligently, not in open court, but behind the scenes.

In general the arrangement of the book is as before, though the opportunity has been taken to effect some alteration. One is perhaps entitled to think that in a book of this kind, as long as the material is readily discoverable, its surroundings hardly matter: it is not as though one sits down to read the book from start to finish in the hope of finding a coherent story. The new material previously accessible only in the supplements, particularly the material sections of the Crown Proceedings Act, 1947, have been retained in full and this is welcome: a book of this kind cannot afford to be half and half: it must be comprehensive, or it is nothing. A more novel addition, which might almost be termed a separate excursus though it fits quite aptly into the alphabetic arrangement of the subjects, is the section on Husband and Wife in the chapter on Damages. It was held by Hilbery J. in *Mallett* v. *Dunn* [1949] 2 K.B. 180, that, even if a woman driver is negligent so as to have the damages for her own injuries appropriately reduced, her husband can nonetheless recover in full any expenses incurred by him on medical treatment and the like, assuming of course that some degree of blame however small (but not presumably minimal) is found against the other driver. Mr. Bingham plainly does not like this decision and launches out on a considerable analysis, not only of the old cases on consortium relied on by the learned judge in support of his view, but also of the admittedly considerable body of opinion, particularly in Canada, which is to the contrary. The last word on this subject has undoubtedly not been spoken yet. The Court of Appeal is still largely unfettered on the topic, and the House of Lords may well be able to throw light upon it with the assistance of the principles of Equity and Scottish Jurisprudence. They will, it is hoped, be able to start getting to grips with the foundations of the problem in *Best* v. *Samuel Fox & Co., Ltd.* [1951] 2 All E.R. 116, where the Court of Appeal was faced with the question as to what, if any, right of action a wife had if her husband was made impotent by an accident.

As before, it is largely on the matters of detail that the interest of the book lies. Damages for loss of expectation of life have ceased to be of much practical importance since *Benham* v. *Gambling* [1941] A.C. 157, but it is interesting to notice how the judges have declined to adopt anything approaching a rule of thumb. When it comes to damages for personal injuries, the figures given as specimen awards are graphically demonstrative of the variations one is liable to get as one moves from judge to judge. Some people rudely describe the whole process as a lottery, but there can really be no doubt that a standardised scale, such as the weekly payments recoverable for industrial injuries under the National Insurance (Industrial Injuries) Act, 1946, is far from satisfying to the ordinary Englishman, whether compulsorily insurable or not. The liveliness of the legal market dealing with industrial injuries is consistent only with there being something satisfying to English folk in a single lump sum of damages—whether it be its finality, or its certainty, or its uncertainty, who knows? Meanwhile the practitioner is left to cope with the well nigh insoluble problem of saying how much a case is worth, and if he gets it right, in the more serious type of injury, within a margin of £1,500, he can feel quite pleased. It will certainly help him to

have as wide a collection as he can of figures indicating how different judges' minds approach the matter, and Mr. Bingham, by spreading his net so widely and so thoroughly, has rendered great assistance.

Another section which has been considerably expanded is that on Innkeepers. Some people regard this as one of the curiosities of the law (*William* v. *Linnitt* [1951] 1 All E.R. 278, 292, *per* Denning L.J.), but that it is very far from obsolete is indicated by the minor spate of cases which has recently developed on the subject, involving Mr. Bingham in some thirteen pages of digested material as against six in the first edition. Not all, of course, is new, but the revived importance of the topic from the motor insurers' point of view has meant a more thorough sifting of the old material. In due course there will be more to come.

The general production of the book is good: the paper will stand roughish treatment; the printing is clear and of adequate size; the names of the cases stand out much better in the Clarendon type than they did merely in capitals; the differentiation of the notes by smaller type is helpful. The price, judged by the general run of legal literature, is not unreasonable: perhaps we have to thank the lay public in insurance offices for some alleviation of a burden which is getting somewhat exacting.

STEPHEN CHAPMAN.

THE LAW OF INSURANCE. By SIDNEY PRESTON and RAOUL P. COLINVAUX. [London: Sweet & Maxwell, Ltd. 1950. xxxvi and 498 pp. (with index). £2 5s. net.]

THIS book is founded upon the late J. B. Porter's *Laws of Insurance*, the first edition of which appeared in 1884. It was in many ways an unsatisfactory treatise, but since it remained for many years the only short work which treated of the main branches of insurance law, other than marine, there was a continuous demand for it, and this is in effect the ninth edition. The publishers had, however, wisely recognised that a drastic rewriting was necessary, and upon this the late Mr. Preston was engaged for a number of years before the outbreak of war. His illness prevented his completing his task which has been efficiently carried through by Mr. R. P. Colinvaux. The result is to all intents a new book, and one which is so great an improvement upon the old that it can confidently be recommended to those who require a treatise upon the non-marine branches of insurance law within a reasonable compass.

The subject-matter is now arranged in three parts: the first dealing with general principles and considerations, the second with the parties to an insurance contract, and the third with special types of insurance, *i.e.*, life, accident, fire, liability, motor vehicle and guarantees. The improvement in this edition over the old is particularly noticeable in the third part, for although Porter discussed these special types he only partially compartmentalised his material, and it was aggravating to have to look all through the book for what one wanted, with only slight aid from an inadequate Index. The most substantial criticism I have to offer of this part of the book is that the short chapter on motor vehicle insurance is not adequate to this important and growing subject. In particular, the absence of reference to the Motor Insurers Bureau, established by the insurance interests under agreement with government, is a serious blemish.

It appears from the publisher's Introduction that while Mr. Preston collected and checked up the material for this edition the actual work of arranging it and writing it up fell to Mr. Colinvaux. This essential side of the editing has been very well done. The style is clear and concise, and a certain woolliness which was sometimes evident in the work of Porter has generally speaking been eliminated.

At the outset an interesting question is raised as to the possibility of the frustration of an insurance policy, and the view is expressed that this is hardly, if at all, possible. I am not aware that the matter is dealt with in other textbooks on insurance law though some writers on contract law have expressed the same view as Mr. Colinvaux, especially Sir Arnold McNair, to whose opinion, given in *Legal Effects of War,* he refers. (See 3rd ed., p. 246: wrongly cited in the work under review as 2nd ed.: also Cheshire and Fifoot, *Law of Contract,* 2nd ed., p. 430.) The theory seems to be that since the insurer's undertaking is limited to the payment of money and there is always 'plenty of money in the world' his obligation cannot be frustrated. On this one may observe that there appears to be no reason why in principle the insurer's obligation should be a monetary one: he might undertake to replace the damaged property, and in fact has an option to do so in the usual fire policy. Again there are other cases where the obligation on one side is a pecuniary one, as under a charterparty where the charterer undertakes to pay the hire, and other sums, but charterparties have been held frustrated in a number of cases. Indeed marine insurance policies must often have been avoided by the outbreak of war, and Sir Arnold McNair himself indicates the possibility of this happening. Such cases can only be taken out of the doctrine of frustration by excluding subsequent illegality from it. It is, of course, possible to regard commercial frustration as a particular instance of discharge by impossibility of performance, which is the position rather tentatively taken up by Anson. Sir Arnold McNair regards this latter view as correct (see his discussion *op. cit.,* pp. 133–4) but he admits that it is against the trend of modern text writers. (The treatment of the subject both in *Cheshire and Fifoot* (*op. cit.*), p. 421, and in *Salmond and Williams* (2nd ed.), p. 361, supports this admission.) Apart from cases of insurances rendered illegal by the outbreak of war it is not easy to see how an ordinary policy could be frustrated, but the considerations adduced above seem to indicate that Mr. Colinvaux has been rather too sweeping in his statement of the law.

A welcome feature is the elimination of a substantial number of unhelpful case references. On the other hand, one useful side of the old Porter was the extensive use of American and Dominion cases which are often of great help on insurance points. It is unfortunate that this side of the book has not been effectively kept up.

C.

Law of Banking. Third Edition. By Lord Chorley, m.a., of the Inner Temple, Barrister at-Law. Formerly Sir Ernest Cassel Professor of Commercial Law in the University of London. Gilbart Lecturer 1938–39. [London : Sir Isaac Pitman & Sons, Ltd. xxvi and 364 pp. 18s. net.]

When this book first appeared in 1938 it was justly acclaimed in a long review in these pages (2 M.L.R. 329) as destined to acquire classic standing as an introductory textbook; and so it has proved. It is designed primarily for the student of banking rather than for the lawyer—and, indeed, its most notable quality is the lucidity of the learned author's explanation of legal principles in language which never pre-supposes an existing knowledge of law in the reader. Though the second edition was published in 1947 it had been prepared in 1945. The present edition brings the text up to date. New cases have little to add to a work of this scope, but it is otherwise with statutes. The effect of the Town and Country Planning Act, 1947, on the values of mortgage securities is very concisely and effectively treated and the author has grappled manfully with the problem of deciding how much so-called 'emergency legislation' must be recognised as having come to stay. Just

what a problem that is, is well illustrated here. What a cruel irony, having decided that the tedious provisions of the Courts (Emergency Powers) Act, 1943, can no longer be kept out of the text, to see the Act removed from the Statute book within an ace of publication! In perplexities of this sort authors and editors deserve, not our criticism, but our profoundest sympathy.

NIGEL BRIDGE.

THE INHERITANCE (FAMILY PROVISION) ACT, 1938. By MICHAEL ALBERY, Barrister-at-Law (with a Foreword by MR. JUSTICE VAISEY). [London: Sweet & Maxwell, Ltd. 1950. 42 and (Appendices) 25 pp. 10s. 6d.]

THE Inheritance (Family Provision) Act, 1938, was greeted with some misgiving as a too fruitful source of litigation. That fear does not seem to have been realised perhaps because capricious disinheritance was not as prevalent as was thought. Nevertheless the Act is not without its difficulties and the present book is a useful review of its scope and effect.

After a very brief historical summary the author considers the conditions under the Act which confer jurisdiction, the limits of the provision that can be made and discusses what is a 'reasonable' provision in the light of the cases. Finally he deals with the practice and in the Appendices sets out the Act, Order LIV F and a review of reported cases. There is therefore a good picture of the practical working of the Act, but it would have been interesting to have also the author's views on its significance—how far it has caused wills to be drawn otherwise than they would have been in its absence. It is evident from such cases as *Jeffrey* v. *Jeffrey* [1950] 2 All E.R. 449, that the Act is having oblique effects outside its strict sphere, and something might have been said of this as also rather more on the effectiveness of the various ways of circumventing its provisions.

The discussion of the Act itself is, however, thorough. The ambiguities of draftsmanship are exposed, and if, as is possible the reader can think of one or two more it is rather to the author's credit since he stimulates a critical approach to the Act. Similarly the reader will not always agree with the conclusions expressed but often this is a matter of personal preference, as with the interpretation of *Re Dorgan* [1948] Ch. 366. In a few cases there are perhaps more solid grounds for disagreement. In *R.* v. *White* [1941] Ch. 192, it would seem that the critical point was not so much the marriage to a Russian as the uncertainties of his existence and whereabouts. At p. 17 perhaps *Dillon* v. *Public Trustee of N. Z.* [1941] A.C. 294, is too easily accepted and one would like discussion of the covenant, not to leave a legacy, but to pay a sum certain after death, or more simply a cheque drawn payable after death. Again at p. 23 the statement that the test of reasonableness is in no sense subjective is perhaps too strong. Where, for example, the statement of reasons is concerned with the reasons for the gift to a stranger rather than for the neglect of a dependant it would seem that the court would not neglect the feelings of the testator for his moral obligations. The reference to Part II of the First Schedule of the Administration of Estates Act at p. 37 is also perhaps obscure since that Order relates to debts, yet an Order under the Act is to be treated as a legacy.

One might also ask that in a future edition more references might be made to periodical literature. To complain of these matters would, though, be unjust. The author has clearly considered the Act with the greatest attention and in his review of it in the text and in the conspectus of cases has furnished a valuable and necessary commentary. The text is closely reasoned but all the material is there if the reader wishes to form his own opinions. In the criticism of the Act measures of reform are suggested. (If it is sound

in principle why should it not be extended to intestacy, since in a will equality among children is not necessarily reasonable?) The author has produced the 'trustworthy guide' of which Mr. Justice Vaisey speaks in the Foreword, and if one criticises it is only the natural failing of asking for more.

J. D. B. Mitchell.

Woolley's Handbook on the Death Duties. Seventh Edition by John H. Munkman, ll.b., Barrister-at-Law. [London : The Solicitors' Law Stationery Society, Ltd. 1950. 228 and (index) 21 pp. 27s. 6d. net.]

Although described as the 'seventh' edition of the well-known *Woolley on Death Duties,* this work is, as its learned author states, an entirely new book. For Mr. Munkman has taken the opportunity, afforded by the repeal in 1949 of the Legacy and Succession Duties and the enactment of new provisions relating to foreign assets, to replan the original work and write in his own excellent style in order to avoid the inevitable patchwork of contrasting styles.

The last edition was reviewed at 12 Mod.L.R. 133, but since the current edition is so different from the earlier ones a brief account of its plan does not seem out of place. The work commences with a short statement of the fundamental principles of liability, including a valuable note on the interpretation of taxing acts. Then follow two chapters devoted to 'Property which passes, or is deemed to pass, at death'; the second of these, the longest in the book, contains a valuable amount of the 'anti-evasion' statutory provisions dealing with dispositions in favour of relatives and associated companies, and also transfers to controlled companies. Other noteworthy chapters are those devoted to 'Foreign Property', 'Double Taxation'—the Conventions will be found in an Appendix—and 'The Valuation of the Estate'. There are, of course, the chapters usual in such a work which deal with such matters as aggregation, deductions and exemptions, payment of the duty, 'ultimate incidence' and so on. The short account of the repealed Legacy and Succession Duties compresses a great deal in a short space for, of course, knowledge of these duties will be necessary for some time both by reason of unsettled pre-1949 cases and the credit given as regards payment of these duties on settled capital.

On the much debated question of 'Legal Avoidance' of taxation, Mr. Munkman leaves the reader in no doubt where his sympathies lie. For, after quoting Lord Simon's well-known dictum about the courts not assisting the ingenious efforts of the 'avoider'—see *Latilla* v. *I. R. C.* [1943] A.C. 377—he says of such schemes: 'They are all open to the objection that they are highly artificial and in some cases they are not far from fraud. From a practical point of view there is a further and decisive objection to these ingenious schemes: the official policy is to stop them, if necessary, by *retrospective* legislation and . . . the taxpayer is left in a worse position than when he started'. The Chapter (XVI) devoted to 'Dispositions Before Death' is, therefore, concerned not with these artificial schemes but with benefits openly available under the existing law such as purchase of annuities, gifts inter vivos, life policies and so on.

The work closes with two chapters which should be most valuable to the practitioner, one on 'Drafting Wills: Consideration of Estate Duty', and the other on 'Death Duties and Conveyancing Practice'. Throughout the work attention has been given to the special application of the estate duty law and practice in Scotland.

The only criticism that can legitimately be made of Mr. Munkman's 'editing' is his reduction of the space devoted to 'Examples of Specimen Estates' from eighteen pages in the sixth edition to three in the present one.

In conclusion the learned editor of *Woolley* is to be congratulated upon maintaining the high standard and value of his predecessor both for the practitioner, who will find the work most useful for quick reference where the larger *Dymond* is not required, and for the student who can ask for no better introduction to the recondite law of the Death Duties. This edition, like the last three, is the prescribed book for the Law Society's Final Examination in this subject.

A. FARNSWORTH.

FEDERAL INCOME, ESTATE AND GIFT TAX LAWS CORRELATED. By WALTER E. BARTON, of the Washington (D.C.) Bar. [U.S.A.: Tax Law Publishing Co., Washington (D.C.). 1950. 835 and (index) 57 pp. $85.00.]

THIS work sets out in parallel columns the provisions of the Internal Revenue Code (U.S.A.) covering the years 1944 to 1949 inclusive, all amendments being integrated into the appropriate sections; the portions of the Code dealt with are those relating to the Federal Income Tax, Estate Duties and Gift Tax. This work, which is hardly reviewable in the ordinary way, is so arranged that all changes in the relevant statutory provisions can be seen at a glance, all amendments being incorporated in italics. To those practitioners concerned with American tax law—and their number in this country must be growing owing to the impact of the recent Double Taxation Convention with the United States—this work should be invaluable.

A. FARNSWORTH.

THE DOUBLE TAXATION CONVENTIONS. Supplement to Vol. 1, Taxation of Income. By F. E. KOCH, A.A.C.C.A., A.C.W.A. [London: Stevens & Sons, Ltd. 1950. 180 pp. (and index). 25s. net.]

THE first edition of this work was reviewed at length at (1947) 11 Mod.L.R. 119–120. This Supplement brings the original volume up to date and is divided into two Parts. Part I refers, where necessary, to the pages of the original work and deals with the amendments, both in law and in practice, made to the Conventions embraced therein. The attention of practitioners is called to section 7 where Mr. Koch epitomises the new Canadian Income Tax Law of 1948 which departs in certain important particulars from the previously current law in that country. The nineteen-page Appendix relating to the Double Taxation Convention with the U.S.A. is a valuable addition for it sets out verbatim the regulations made by the U.S.A. Treasury for implementing that Convention.

Part II of the Supplement deals with Double Taxation Conventions entered into by the United Kingdom since the main work was published in 1947, namely, New Zealand, British Overseas Territories, the Netherlands, Sweden and Ireland. These Conventions are ably annotated by Mr. Koch in the same way as for the main work; he continues his valuable practice of giving a brief outline of the relevant income tax law of each country. The lawyer or accountant concerned with this very complicated branch of income tax law has doubtless already acquired the first volume and will find that this Supplement is essential to his work if he is to be in a position to cope with all the problems that can arise under these Double Taxation Conventions.

A. FARNSWORTH.

Rating Valuation Practice. By Phillip R. Bean and Arthur Lockwood. Foreword by Harold B. Williams, K.C., LL.D. Second Edition. [London : Stevens & Sons, Ltd. 1950. viii and 334 pp. (index, 9 pp.) 30s. net.]

Since this work first appeared in 1946, it has gone through both a second impression and a second edition—facts which speak for themselves as regards its value to all concerned with rating matters; the first edition was reviewed at (1947) 10 Mod.L.R. 93–4.

The new edition has been lengthened by over a hundred pages, to a great extent due to entirely new matter arising out of the provisions of the Local Government Act, 1948, which made drastic changes both as regards the basis of assessment and the officials charged with the valuations, who are now the Valuation Officers of the Inland Revenue Department. This has necessitated additional chapters relating to these matters and also a final chapter (No. 18) in which the Income Tax law relating to the taxation of land and buildings is incorporated in some thirty-four pages; the Appendix contains the official Draft Specifications of 1938 Costs of post-1918 houses. This work should prove most useful both to those concerned in the practical side of valuations for rating purposes and to those who are anxious to pass the tests of the two professional bodies for whom, incidentally, the authors act as honorary examiners.

A. Farnsworth.

Patents for Inventions and the Registration of Industrial Designs. By T. A. Blanco White, Barrister-at-Law. [London : Stevens & Sons, Ltd. 1950. lix and 389 pp. 45s.]

Patents and Registered Designs. By T. A. Blanco White. Second Edition. 'This is the Law' Series. [London : Stevens & Sons, Ltd. 1950. ix and 79 pp. 4s.]

The Patents Act, 1949, consolidates the numerous statutes affecting the patent law which came into force between 1907 and 1949, and incorporates the very important changes enacted in 1949 on recommendation of the Patent Law Reform Committee. These changes alter not only the codified portions of the patent law, but also a large body of case law on patent problems built up over decades. The writer of a textbook on the patent law as it stands in 1950 is therefore confronted with the complex task of weeding out the many cases decided before December 31, 1949, which have been rendered obsolete by the new legislation, and of interpreting the novel provisions of the 1949 Act without the help of judicial pronouncements. This task Mr. Blanco White has performed admirably. The established practitioners of patent law—counsel, solicitors and patent agents—to whom Mr. Blanco White's work is particularly addressed, will find in his book all the information they need on practice at the Patent Office as well as on patent litigation in the courts. A comprehensive Table of Cases, an annotated Table of Statutes, a good Index, as well as ample and well-defined head notes make it easy to find any information desired. The text of the Patents Act, 1949, and related enactments, such as parts of the Income Tax Act, 1945, the Crown Proceedings Act, 1947, and the Monopolies and Restrictive Practices Act, 1948, are reprinted in the Appendix of the book. It might have been useful if the text of the Patents Rules, 1949, had been added.

The treatment given by Mr. Blanco White to registered designs on the other hand is scanty. Twenty pages are devoted to this subject as such. Otherwise the reader is told in various chapters that the exposition given on the patent law does or does not apply to registered designs. Up to 1949 the law

on patents and registered designs was contained in one and the same Act. The legislator has, however, now recognised that these two branches of industrial property law merit separate treatment and has passed the Patents Act, 1949, and the independent Registered Designs Act, 1949. It may be well if textbook writers followed this lead.

In the introduction to his main work on Patents for Inventions and in his booklet on Patents, Mr. Blanco White expounds the practical difficulties of protecting inventions by means of a patent monopoly and examines the question which is so important to businessmen and their advisers: How much use are patents? The author comes to the conclusion that for the minor invention, the simple gadget, the patent system works reasonably well, but for the really important invention, the completely new technique involving large capital investment, the patent system is relatively ineffective. Unfortunately, the reviewer must agree with this pessimistic outlook of the author. It should, however, be remembered that several of the reforms introduced in 1949 constitute a step forward to remedy this situation. Right at the top of page 1 of his book, Mr. Blanco White quotes a dictum by Mr. Justice Roxburgh saying: 'The whole trouble is that the English language is unsuited to patents actions'. With this the reviewer disagrees heartily. There is nothing wrong with the English language in its application to legal or technical problems. What is wrong is the legalistic interpretation given to patent specifications, which are technical and not legal documents, by the courts.

Both Mr. Blanco White's books are eminently suitable to students interested in the subject of patent law. However, as long as study of this subject is so sadly neglected in the curriculum of British Universities, students can hardly be expected to devote much time and interest to it.

Mr. Blanco White has the art of expressing complicated legal problems in lucid and simple language. This should make the second edition of his booklet on Patents and Registered Designs issued in the 'This is the Law' Series particularly useful to manufacturers and other businessmen to whom it is principally addressed.

PETER MEINHARDT.

THE SOLICITOR'S GUIDE TO DEVELOPMENT AND PLANNING. By R. N. HAMILTON, LL.B., Solicitor. [London: The Solicitors' Law Stationery Society, Ltd. vi and 122 pp. 7s. 6d.]

BETWEEN 1947 and 1949 there appeared in the *Solicitors' Journal* a number of articles from the pen of Mr. R. N. Hamilton dealing with Town and Country Planning law. The legislation of recent years concerned with these subjects has called forth a flood of expositions on the greater and lesser scale. Of the less extensive in dimensions, a front rank position has been rightly attained by these articles which, in an expanded form to comprise new matter, has been issued as one of the admirable series of 'Oyez Practice Notes' published by the Solicitors' Law Stationery Society. Mr. Hamilton has aptly applied planning to his own exposition of the intricate law on the subject, and together with lucidity of statement this is the major merit of his work. After a comprehensive introduction, sub-divided under the headings 'Control of Development' 'Development Charge' 'Depreciation Payments' 'Compulsory Acquisition of Land' and 'Development Plans', the author deals with the Administration of the relevant law, explaining with the necessary amount of detail the Survey and Development Plan, the Control of Development and Planning Permission, Planning Appeals, Development Charges and Miscellaneous Powers, phrases of themselves which go to show that either a new nomenclature or a novel application of old nomenclature has been brought into the vocabulary of the law. He proceeds to consider Agreements and Covenants restrictive of the User of Land (a phraseology much nearer to the lawyer trained under older

conditions) and then tackles the problems of 'Depreciation Payments, and Compensation in respect of Planning Control' and 'Claims for Depreciation of Land Values'. We come again to the new terminology in 'Ripe and Near-Ripe Land' and then certain special cases are considered, as also the requisite advertisements. 'Minerals' and 'Compulsory Requisition' follow and then comes perhaps the paramount question for the majority of practitioners, namely, 'Conveyancing Practice'. The reader must refer to the text to appreciate Mr. Hamilton's standpoint, but, briefly stated, it may be said that he takes a conservative view as to the effect of the new planning legislation on conveyancing, and it is believed that he has the majority on his side. A conveyancer reading this section will, not unnaturally, be inclined to regard it as the most important section of the work, and no other section brings out more clearly Mr. Hamilton's expository gifts, while, within its own spatial limits, it is certainly one of the most helpful of the torches to illuminate the difficult path which confronts the adviser on title and the draftsman, who with the mass of literature on the subject has sometimes been unable to see the wood for the trees. This work shows a clear track through the jungle and over and above its own merits it affords an admirable introduction to larger treatises.

Bertram B. Benas.

The Elements of Drafting. By E. L. Piesse, a Solicitor of the Supreme Court of Victoria, and J. Gilchrist Smith, ll.m., a Solicitor of the Supreme Court (Honours). [London : Stevens & Sons, Ltd. xvi and 123 pp. (index 9 pp.) 10s. net.]

While this short book may, no doubt, be the first of its kind exclusively devoted to drafting in general, the subject has been expounded at varying length in several larger works. The Bibliography at p. xv is indeed testimony in that behalf, a bibliography which is by no means exhaustive. In original form the text of the work as prepared by Mr. Piesse appeared as a series of articles in the Law Institute Journal of Australia and constituted the lecture notes for the courses delivered by the author and his colleagues in the University of Melbourne. For the present edition, in which Mr. Piesse is joined by Mr. J. Gilchrist Smith, the book is adapted to the needs of readers in this country by the substitution of English cases and statutes for many of the Australian and further discussion of practical points peculiar to English law. The strong point of the work is the scheme of exposition. After a most readable introduction, which includes the general rules contained in the classic *Davidson,* chapters deal with 'Arrangement and Order' 'Drafting in Paragraphs' 'Use of Definitions' 'Draftsmen's Habits You Should Avoid' and intriguing chapters entitled 'Shall', followed by those on 'Provisoes' 'Problems of "And" and "Or"' 'Aids to Clearness and Accuracy' and 'Expressions relating to Time'. There is quite a comprehensive Index which shows that the book contains more matter than at first sight seems obvious. The more arguable characteristic is its tendency to ultra-modernity. The present writer recalls an incident told to him by his Master in the Law who was one day in consultation with that eminent conveyancer, E. P. Wolstenholme. The former submitted a draft—the incident occurred a few years after the great conveyancing enactments of the early 'eighties—which did not make use of the shortened phraseology introduced by the statutes associated with the draftsmanship of the latter. Wolstenholme said to his younger colleague, 'Don't you trust my forms?' to which the latter replied 'I admire them very much but I am playing for safety. The older forms have stood the test of time'. Within limits there is a valuable moral in the reply. As Sir Frederick Pollock observed in *The Land Laws* (13th ed.), p. 167, in relation to Wolstenholme's short circuiting of phrases, 'The use

of a few prescribed words will now incorporate in a deed, according to the nature of the case, one or other of the several accustomed clauses which were formerly inserted at full length; and in ordinary straightforward cases this may be conveniently done'. But every case is not ordinary nor straightforward. *Williams on Real Property* in the chapter 'Of the Present Form of Conveyance', and Prideaux, *Precedents in Conveyancing* (24th ed.), p. 77, may be usefully referred to in relation to common forms and their employment, and the matter is dealt with in the article on Conveyancing Practice in the *Encyclopaedia of the Laws of England* (3rd ed.). It seems that the authors of the present work have leaned towards the over-simplification in style which the practitioner is too frequently importuned to adopt by the lay client. Too high a price can be paid for this concession and if it is to be granted, a modern practice, which has its merits for this purpose, is to provide an interpretation clause prefixed by that useful if not very elegant verb, 'means'. There is an artistry in draftsmanship as well as science. Did not one of the most eminent conveyancers of old refer to 'a brilliant deed' in relation not only to its matter but to its manner? It must, however, be borne in mind that the book does not deal merely with 'pure conveyancing', it includes drafting in the more comprehensive sense and what may not be artistic draftsmanship in the former, may be regarded as workmanlike in the more miscellaneous spheres. What looks like a somewhat forbidding subject has been presented with much skill and felicity, and lawyers generally will find it a useful companion to daily work of various kinds.

BERTRAM B. BENAS.

ENCYCLOPEDIA OF CRIMINOLOGY. Edited by VERNON C. BRANHAM, M.D., and SAMUEL B. KUTASH, PH.D. [New York: Philosophical Library. 1949. xxxvii and 527 pp. $12.00.]

THIS Encyclopedia, edited by a psychiatrist and a psychologist, exhibits most of the good as well as of the bad characteristics of symposia of this kind. With sixty-one contributors, coming from very different disciplines, though all of them Americans, it is well-nigh impossible to achieve any consistent line of policy. Whereas a few of the names represented are familiar household words throughout the criminological International, such as the Gluecks, Walter C. Reckless, Negley K. Teeters, many others are unknown, at least outside the U.S.A. While some of the articles are substantial contributions to our knowledge, a good many are so brief and insignificant that they might just as well have been omitted. The Index, with its failure to give page references and to link the names of contributors to the articles, is not very helpful either. Less than half a page on the 'Habitual Criminal', two pages each on 'The Causation of Crime' and on 'Juvenile Delinquency', or one-third of a page on 'Suicide' does not strike one as a very generous allowance. There is no article on Juvenile Courts, and those of us who are anxious to improve our knowledge of the meaning of 'Justice' are coldly referred to 'Psychoanalysis' (the reference might have been, with perhaps greater justification, to the article on sentencing policy mentioned below).

On the other hand, there are some contributions of high quality on such subjects as 'Changing Concepts of Crime' by Professor Albert Morris, on 'Criminal Law and Procedure' by Nicholas Atlas, on the 'Prediction of Criminal Behaviour' by Professor Monachesi, and a particularly illuminating discussion of 'The Sentencing Behaviour of the Judge' by Professor Frederick J. Gaudet, a psychologist who has made a special study of this delicate subject. Among other points, the percentages of acquittals in different courts and the nature of the sentences imposed by different judges are compared. If, for example, one judge found guilty 98 per cent. of a sample of 546 persons charged

with drunkenness and another judge only 21 per cent. of a sample of 673; if one judge fined 84 per cent. and imposed suspended sentences in 7 per cent. of his cases, while his colleague in the same court and within the same period fined 34 per cent. and gave suspended sentences in 59 per cent., what may be the explanation? Detailed quotations are given from a study of the sentencing behaviour, over a period of ten years, of six judges in the State of New Jersey, all of whom were regarded as of over average ability and integrity. Among the chief findings of this inquiry was the predominant significance of 'personality factors' which apparently were but little affected by length of judicial experience. As Professor Gaudet rightly stresses, the term 'personality factor' can, however, merely be regarded as 'an invitation to investigate the problem more thoroughly'. Will this invitation be accepted?

Hermann Mannheim.

The Trials of Frederick Nodder. Edited by Winifred Duke. Notable British Trials Series, Vol. 72. [London: William Hodge. 1950. xiv and 242 pp. 15s. net.]

The two trials of Frederick Nodder, better known (from the name of the victim, a ten-year-old girl) as the *Mona Tinsley Case,* took place in the Midlands some twelve years ago. The transcripts now available in the Notable British Trials series make interesting reading, not least because, though the case was perfectly clear to the police from the outset, conclusive evidence against the prisoner was difficult to obtain and the judge at each trial (Mr. Justice Swift at the first and Mr. Justice Macnaghten at the second) found it therefore incumbent upon him to come out strongly against the prisoner in order to secure a verdict of guilty.

Nodder, a middle-aged man of no occupation and extremely unprepossessing looks and habits, had abducted a little schoolgirl with whom he was acquainted, taken her for a night to his home and next day strangled her, presumably after sexual intercourse. Within twenty-four hours of the disappearance of the child, the police had tracked down the criminal, but that is where their real difficulties began. Despite intensive search, it proved for several months impossible to discover any trace of the body, or indeed, any evidence which would have satisfied a jury that the girl had been murdered at all. Accordingly, on Nodder's first trial, the charge was only abduction (Offences against the Persons Act, 1861, s. 56) and the evidence the prosecution was able to offer even for this offence was by no means ample. In view of the paucity of evidence, Mr. Justice Swift's summing up is perhaps best described as one long comment on the fact that the prisoner had chosen not to testify on his own behalf. A verdict of guilty was duly returned and the prisoner sentenced to the maximum penalty of seven years' penal servitude.

A few months later, the body of the murdered child was recovered from a river at a considerable distance from the scene of the crime, and Nodder could now be tried for murder. Once again there was little definite proof to connect the prisoner with the crime and the disposal of the body. This time Nodder went into the witness box and told a story which would have exonerated him, if true. He was unable to corroborate it by any evidence whatever, but neither was the prosecution able to contradict it conclusively or to shake him in cross-examination. It was thus left to Mr. Justice Macnaghten, in his conclusive summing up, to tear to pieces the story put forward by the accused and to secure a verdict of guilty.

To the credit of criminal justice in this country be it said that, despite two trials and two appeals, the criminal was executed within a year of committing the murder.

H. A. H.

Comparative Law: Cases and Materials. By Rudolf B. Schlesinger, Associate Professor of Law, Cornell University. (University Casebook Series.) [Brooklyn: The Foundation Press Inc. 1950. xxxiv and 552 pp. $7.50.]

Just fifty years ago Sir Frederick Pollock called comparative law, at its first International Congress at Paris, 'a most modern science born within living memory'. In the half century which has since passed comparative studies in the law have attracted an increasing number of scholars and students and have proved that they can be of value not only as a key to different philosophical, sociological and economic conceptions of other nations as reflected in their legal systems, but also as a guide towards a more critical examination of our own law. By the introduction of regular courses, law schools in the United States and in the British Commonwealth have, since the end of the war, begun to give definite recognition and encouragement to this work. Language difficulties and above all the scarcity of foreign codes and commentaries in the libraries are unfortunately still a serious obstacle and it is for this reason that the publication in the United States of a casebook of comparative law—the first in the English language so far as the present reviewer is aware—is an event of importance.

As the editor, Professor Schlesinger, says in his Preface, 'one who projects a course on comparative law cannot possibly hope to cover "the subject"'. This book, bulky as it is, contains 'that miniscule portion' which he collected and tested in a thirty-hour course for students at Cornell University and, given the fact that as a subject for organised study comparative law is still on the testing ground, it is an interesting beginning.

Leaving aside the law of Soviet Russia and her Communist satellites, which he says should be (and is in the United States) treated as a specialised separate course, Professor Schlesinger divides existing legal systems for his purpose into a 'common law minority and a civil law majority' and gives it as his view that 'a comparative law course thus becomes one seeking to convey [to students brought up in the common law] some understanding of the mental processes of lawyers in the civil law world'. How this is to be achieved must inevitably be at this stage a matter for individual judgment; in the work under review the editor has chosen what might perhaps be termed an 'extensive' method, with extracts from various Continental Codes and a number of foreign judgments, but with the main weight resting on lengthy extracts reprinted from periodicals and textbooks on a considerable variety of subjects, connected by explanations and amplifications provided by the Editor himself.

Detailed criticism of such a compilation would obviously be out of place here, the more so since Professor Schlesinger makes no exaggerated claims for his work and, indeed, himself expresses doubt about the suitability of some of the materials chosen for inclusion. There can, on the other hand, be none that this first *Casebook and Materials in Comparative Law* contains a vast amount of information not otherwise easily accessible and that the form in which it is here arranged is lively and stimulating. A valuable 'Summary of articles on comparative and foreign law in English language periodicals between 1929–1949' covering seventy pages is included as an Appendix.

H. A. Hammelmann.

Cases and Other Materials on World Law. By Louis B. Sohn. [Brooklyn: Foundation Press. 1950. xxii and 1363 pp. $8.00.]

As Professor Sohn points out in his Preface, 'The creation of the United Nations and the blossoming of many specialised agencies have brought into

a new focus the need to gather the materials forming the basis of the constitutional law of the world community'. The Preface shows that the learned editor considers, although he does not actually use the term, that the inductive approach is the best method to adopt in order to obtain an understanding of this constitutional law. For this reason he uses the terms 'Cases' and 'Casebook' in a wider sense than is normal in this country. Apparently the term is used to mean 'issue', for there are only thirteen judicial cases actually reported, while reference is made to numerous debates in the various organs of the United Nations.

It cannot be denied that debates tend to show the practical significance of a particular document and the interpretation that its parties—or some of them—regard as correct. It is doubtful, however, whether it is fair to students to present them with, for example, long extracts from the discussions concerning the treatment of Indians in South Africa, particularly in connection with the controversy concerning the interpretation of the term 'domestic jurisdiction'. Instead of clarifying the issue, this is only likely to befuddle their minds. Similarly, it is difficult to see how private documents like the 'Draft of a World Constitution' of the Committee to Frame a World Constitution, the 'Statement of Beliefs, Purposes and Policies' of the United World Federalists or the petition submitted to the General Assembly of the United Nations by a number of private citizens in 1946 containing 'Proposals for Amendment to the United Nations Charter' can be regarded as 'forming the basis of the constitutional law of the world community'.

Students of international law and relations who are specialising in problems concerning international institutions will find Professor Sohn's *Cases on World Law*—to use the title that appears on the spine of the volume—a handy source book, but whether it will be adequate for students of either discipline is by no means certain.

Leslie C. Green.

National Insurance. By D. Potter, m.a., and D. H. Stansfield, b.a., Barristers-at-Law. Second Edition. [Butterworth. 1949. xix and 553 pp. 30s. net.]

This edition is divided into three Parts, being a General Introduction, an analysis of the Act of 1946, and an analysis of the statutory instruments made under that Act. It contains a statement of the law as it was on July 5, 1949 (one year after the date when the Act became fully operative) and 'leaving it', as the authors say 'to the industry of the practitioner to find out what has happened since, if he can'. In addition, the provisions of the N. I. Act, 1949, have been mentioned in the appropriate places.

The General Introduction is very full and contains a summary of the Beveridge Report, the Government White Paper of 1944, and the new system as it emerged in the Act of 1946. The statutory analysis, apart from purely textual comment, contains (as is usual in a book of this kind) the essential references to the statutory instruments later set out and frequently refers to the Parliamentary debates for greater clarification. The analysis of the instruments is, perhaps, rather superficially done; more reference to and quotation from the reports of the N. I. Advisory Committee would have improved the exposition. Occasionally the wood disappears in the multitude of trees. Thus the relationship between section 17 (widow's benefit) and section 20 (retirement pensions) is not immediately made clear to the reader of the former section. A few examples would help the explanation of many of these benefit sections (especially section 18). Similar small points could be discovered but they would not materially detract from the very great value of this book. For, without doubt, this is a Herculean task successfully carried out and I, for one, would sooner cleanse the Augean stables.

This being so, the authors may well be little impressed by a general comment. But it is, I think, worth making. The sources of N. I. law are three: the Act, the S.I.s., and the cases, including the decisions of the Commissioner. Would it not be possible, for the purposes of exposition and comment, to treat these three together? As I have already said, cross-references abound. But could not, for example, section 11 and S.I. 1948 No. 1277, section 43 and S.I. 1948 No. 1144, section 22 and S.I. 1949 No. 1204 be dealt with, in each case, as one? The section could be set out and explained by reference to the S.I. and the decisions. The S.I.s themselves could be included, without comment, at the end of the book. This would, I think, reduce the to-ing and fro-ing which is at present necessary.

I have a theory, which has no foundation in fact, that Messrs. Butterworth first approached one of the authors only, and that he replied, in the words of Archbishop Laud: 'Indeed, my lord, I am for "thorough", but I see that both thick and thin stays somebody . . . and it is impossible for me to go thorough alone. Besides, private ends are such blocks in the public way and lie so thick, that you may promise what you will, and I must perform what I can, and no more'. So the other author was added and the result was, indeed, 'thorough'.

J. A. G. Griffith.

Cases and Materials on Soviet Law. Selected and compiled by John N. Hazard and Morris L. Weisberg. [Parker School of Foreign and Comparative Law, Columbia University. Cyclostyled. 1950. 431 pp.]

This is an improved and enlarged version of Professor Hazard's Casebook. The form of a Casebook is especially adapted to American law school requirements, where there is greater emphasis on familiarisation with original sources and less on abstract principles. Yet it is of considerable value to the English lawyer interested in other systems of jurisprudence. We already have such works as *Gsovsky's Soviet Civil Law* (Michigan University, 1948, 2 vols.) which give a lucid account of the current state of Soviet law. What Professor Hazard supplies is a lively sense of the technique and atmosphere of the Soviet legal system. As a country of 'case-lawyers' we in England can understand much better a system presented to us in illustrative decided cases. The other materials, original decrees, extracts from treatises, articles from learned journals, are also valuable in giving us an authentic picture. The treatment is objective and scientific. Good points stand out for imitation; bad ones are in no way camouflaged. The volume suffers from the inherent vice of all Casebooks—there is a good deal of material whose interest has not outlived the case itself. Thus the complicated hierarchy of appellate instances, with the revisory as well as the appellate jurisdiction, makes very hard reading at times. We follow a case with strenuous attention up to the highest level, only to find it remitted for new trial, with often only vague reasons given. The authors cannot be blamed for this legal fact, but in future editions possibly the lot of the reader may be made easier. Some obsolete law is also found in texts cited, but this again is a common experience with Casebooks.

The book is ambitious in scope, covering every aspect of Soviet law. The common lawyer should find no difficulty in following the arrangement, which is much like our own. Each chapter has a concise bibliography. The texts are annotated here and there by footnotes. A very useful general bibliography of works on modern Russian law in the English language is provided (pp. 424-430). It is significant that the 'Red-baiting' Americans have produced far more material on Soviet institutions than the 'Radical' English! A notable reference in the bibliography is to a Current Digest of the Soviet Press. Throughout the book extracts are given from Soviet periodicals

and books which are unobtainable in England, and this is one of the book's main recommendations.

Any appreciation of the substance of the work would develop into an analysis of its contents, which is not the function of a review. All the most interesting topics are dealt with, *e.g.*, Government arbitration tribunals, criminal liability by analogy, the legal profession, labour law, the elastic rules of evidence. Among rules of a detailed kind two references must suffice: a motor car is treated as a 'dangerous thing' for purposes of liability; the expenses of a rescuer of property must be paid.

Recognition of the political background of Soviet law is found in the accounts of 'public property', prohibition of 'middle men', prohibition of bequests to the Church, punishment of criticism of the regime, and in many other places. Many of the original audacious features of Soviet law, *e.g.*, in family law, have now given way to more usual conceptions.

The constant translator of original sources inevitably loses some of his sense for strict English usage. The meaning of the text is seldom obscure, but some phrasing is awkward. The present reviewer has only noticed two mistranslations which are really ambiguous, the use of 'pursue' for 'persecute' on p. 386, and the failure to give technical legal explanations for the two classes of infants on p. 418. Americanisms are only to be expected in a work primarily addressed to the American reader. Most of these are understandable to the English reader. 'Hangover' on p. 157 refers to 'vestiges' or 'outworn habits' and not to alcoholism.

A. K. R. K.

THE NORTH ATLANTIC PACT, THE BRUSSELS TREATY AND THE CHARTER OF THE UNITED NATIONS. By Sir W. Eric Beckett. Published under the auspices of the London Institute of World Affairs. [London: Stevens. 35 (appendix) 36 pp. 12s. 6d. net.]

This booklet, a reproduction of an address by the legal adviser to the Foreign Office, examines the juridical relationship between the North Atlantic Pact, Brussels Treaty and the Charter. The author rightly emphasises that neither is a regional association within the meaning of Chapter VIII of the Charter; both pacts are based exclusively on Art. 51, in which member States retain the right of self-defence, individual and collective. Those critics of the North Atlantic Pact who assert that it is inconsistent with the Charter, fail to appreciate the distinction beween enforcement action, which can only be authorised by the Security Council, and action in self-defence under Art. 51 which does not require a similar authorisation. One reason for this confusion is probably that Art. 51 was included in Chapter VII dealing with enforcement.

Member States retain not only the right of self-defence (there must be an armed attack), but also, within certain limits, the right to decide when to take action. It may be regretted that this introduces ino the Charter an anarchic element, but that document reflects the facts of international life. Having insufficient confidence in the ability of the Security Council to protect their independence and territorial integrity, member States sought to reinsure themselves by clinging to their inherent right of self-defence. Art. 51 was introduced for this specific purpose. Paralysis of the enforcement machinery of the United Nations has resulted in increasing resort to this article, which is playing the same role today as Art. 21 of the League Covenant did in providing the legal basis for defensive alliances against aggression. Whether the United Nations any more than the League can survive such a development is a question which lies outside the scope of this work.

Ieuan G. John.

REPORTS OF INTERNATIONAL ARBITRAL AWARDS. Recueil des Sentences Arbitral. Vol. III, United Nations Publication. [Leyden, Holland : 1950. 858 pp. (index)]

THIS third volume of reports of international arbitral awards covers cases up to 1941, including the arbitration on the Wal-Wal incident between Italy and Abyssinia in 1934. The three volumes now published present a useful collection of arbitral awards. This volume contains an Index and Table of Contents for all three volumes.

SIGNATURES, RATIFICATIONS, ACCEPTANCES, ACCESSIONS, ETC., CONCERNING THE MULTILATERAL CONVENTIONS AND AGREEMENTS IN RESPECT OF WHICH THE SECRETARY-GENERAL ACTS AS DEPOSITORY. [United Nations, Lake Success, New York. 1950. 138 pp. 8s.]

RATIFICATIONS include those of the Charter of the United Nations and the Statute of the International Court of Justice of the Revised General Act. Genocide, International Trade, Opium 'Traffic' and Educational matters.

I. G. J.

CASES ON MERCANTILE LAW. By J. CHARLESWORTH, LL.D. [Stevens & Sons, Ltd. 1951. xxxii and 328 pp. 21s. net.]

THIS book contains a selection of 150 cases, covering, in the same order of arrangement, the wide field of the author's well-known *Principles of Mercantile Law*. Each case is introduced by a concise statement of the rule it illustrates and by a short account of the facts and decision. Extracts from the judgments are usually followed by notes which explain the rules against the background of other decisions on the subject.

The cases selected contain more than the usual proportion of recent decisions and the notes show even more strongly a most welcome attention to modern developments. It is, therefore, a little surprising to find *Foakes* v. *Beer* as one of the cases selected to explain Consideration. Whatever the *High Trees Case* may not have achieved it has certainly left little scope for the rule in *Foakes* v. *Beer*. The *High Trees Case* is, of course, mentioned but in rather too narrow terms. Similar reluctance to replace old by modern authority is shown on the subject of damages. Here the *Victoria Laundry Case* is only dealt with, although at some length, in the note on *Hadley* v. *Baxendale*. If it is still proper to distinguish between the first and second rule in *Hadley* v. *Baxendale* then such cases as *Collins* v. *Howard* and *Mason* v. *Burningham* should come under the first, rather than the second rule.

The note on *Phillips* v. *Brooks*, although a useful summary of the cases, is apt to confuse as the cases are treated as establishing a series of no less than seven propositions rather than as illustrations of the one or two rules to which this subject can be reduced. One of these propositions is based upon the very doubtful decision in *Sowler* v. *Potter*, which is cited without indication of the critical reception of the case. The note on Price Maintenance Contracts, which is particularly valuable as it explains the relation between law and business practice, ought to make some mention of restraint of trade. A similar failure to explain the relation between distinct legal principles detracts from the value of the notes on *Tweddle* v. *Atkinson* and on

Watteau v. *Fenwick*. The former case is given to illustrate privity of contract without mention of Consideration, the latter is used to illustrate implied authority which is not distinguished from apparent authority. On this point the author has adhered to the terminology of his 'Principles' as also in his description of *Del Credere* Agency as an instance of indemnity.

This book will be of value mainly to those who have no access to law reports. With such readers it may leave the impression that judgments largely consist of statements of broad legal principles. Again, the concentration upon isolated passages, such as Lord Wright's observations on section 14 (2) of the Sale of Goods Act in *Grant* v. *Australian Knitting Mills*, might conceal the diversity of legal issues raised by a single case. These dangers are perhaps inevitable and they are, indeed, a small price to pay for the benefit which this book will secure for the student in deepening and bringing up to date the information obtained from the 'Principles'. The present work will no doubt share the success and popularity achieved by the author's textbook.

J. Unger.

Les Crises de la Notion d'Établissement Public. By Roland Drago. With a Preface by Professor M. Waline. [Paris: Editions A. Pedone. 1950. 261 and 21 pp.]

'They do things better in France' has never been one of the English lawyer's sayings. Nevertheless it is true that his preference for his own ways and thoughts in public law, at any rate, has been slowly weakening. Droit Administratif has become naturalised as Administrative Law even if in the process of changing its name it has also changed something of its nature. On the whole, however, interest in French public law is still largely exhausted by the contemplation of separate systems of courts and the special rules of responsibility for official acts. Yet it is obvious that the problems of government are not peculiar to any one country; such matters as the public control of major industries, the answerability of public boards to Parliament (or its equivalents), the appropriate modes by which the extended governmental functions of the present day should be carried out, are all part of a heritage shared by many countries, and this country has not been alone in the development of boards, whether of a commercial or of a social service character.

In this field events of the past years have brought about an added unity, and there is much to be learnt from the efforts of others in solving problems akin to our own. The present book is one of considerable interest on this topic. Its subject is the *établissements publics*, the corporate bodies which have financial autonomy yet are subject to varying degrees of administrative control by the State, and which stand between the governmental agency strictly so-called and the public utility in the sense of a private body carrying on a public service. It is true that from some points of view its interest is local, the pure problem of classification of any body into a particular type is not one of general interest, and moreover, any solution has little to offer as a reward but an intellectual satisfaction. Despite this, however, the present study of the idea of the 'établissement public' is of general interest. The author traces the growth of the conception from revolutionary times, through such institutions as schools, hospitals and universities endowed with corporate personality, an independent patrimony and pursuing a public service. He examines in detail the classical conception of the institution and then proceeds to examine the growth of commercial and industrial organisations of like character, nationalised railways and autonomous posts. There follow the great changes of the period since 1940 with the growth of professional bodies with 'public' powers and the more widespread nationalisation. Throughout, the

approach is analytical and all these institutions are related back to the fundamental concept. The result is a clear picture of the development of governmental activity and the adaptation of existing legal forms of organisation. Obviously much is peculiar to France, but the detailed rules relating to the various organisations have much to provoke thought. There is, for example, the sub-commission of the Assembly charged since 1947 with reviewing the activities of nationalised industries, or the discussion of status of the staffs of such industries, the controlling staff being primarily governed by public law, the ordinary employees standing in a common law relationship to the board. Indeed, it is this existence of the double system of law which by compelling closer analysis, consists in getting a clearer picture of the true position of public boards. If after reading this book the reader does not fall in love with other ways he may have a clearer head for reviewing his own.

J. D. B. MITCHELL.

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A Southern Lawyer: Fifty Years at the Bar. By Aubrey Lee Brooks. [Chapel Hill: The University of North Carolina Press. London: Geoffrey Cumberlege. viii and 214 pp. 28s. net.]

University of Western Australia Annual Law Review. Vol. I, No. 3. December, 1950. [Law Book Co. of Australasia Pty., Ltd.: 7s. 6d. net.]—The present issue includes several articles of general interest, including one on Res Judicata in Divorce and others on topics in the field of Constitutional Law.